Supreme Court, U. S.
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In the Supreme Court of the United States

CASE NO: 77-294

ABRAHAM THOMAS OLIVA,
Petitioner,

vs.

STATE OF FLORIDA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEALS FOR THE STATE OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEALS FOR THE STATE OF FLORIDA

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Third District Court of Appeals, of the State of Florida entered in the above styled case on June 7, 1977.

OPINION BELOW

The opinion of the Third District Court of Appeals of the State of Florida is reported at_____So.2d____and is printed at Appendix A.

JURISDICTION

The judgment of the Third District Court of Appeals for the State of Florida was entered on June 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Is it a violation of Defendant's due process rights to allow the State to introduce prejudicial evidence concerning a prior transaction between the parties which was introduced solely for the purpose of showing the bad character of the Defendant?

2. Is it a violation of Defendant's due process rights for the trial court to allow highly inflammatory and prejudicial comments during closing arguments would serve to inflame the jury and indicate to same the Court's belief in the Defendant's guilt?

3. Is it a violation of Defendant's due process rights, and rights under the Sixth Amendment to the United States Constitution to unreasonably restrict Defendant's right of cross examination of a State's principal witness?

STATEMENT OF THE FACTS

The first witness for the State of Florida was Deborah Young, a police officer with the Public Safety Department, located in Miami, Florida. (TR 10) Miss Young testified that she had been employed as a police officer for approximately four years, and was presently employed in the capacity as a training instructor at the Police Academy located in Miami, Florida and had been so employed for approximately nine months. (TR 10-11) Miss Young testified that prior to her function as a training instructor, she had been a narcotics investigator for the Public Safety Department for three years. (TR 11)

Miss Young stated that on or about September 5, 1975, she was in Key West, Florida assisting the Florida Department of Criminal Law Enforcement in an investigation. That on that date in particular, she met with three agents of the Florida Department of Criminal Law Enforcement, Agents D'Alessandro, Agent Griffith, and Agent Brown, and a confidential informant known as Arthur Moore. (TR 11-12) She further testified that a meeting was held with these individuals and that immediately subsequent to the meeting she and Arthur Moore made a buy of narcotics. (TR 12)

Miss Young testified that approximately 12:20 p.m. she drove with Mr. Moore to the tennis courts located at Atlantic Blvd. in Key West. That, at that time, an individual, who is the Defendant, Thomas Oliva, drove up to where she and Mr. Moore were in his white cadillac. She testified that Mr. Oliva got out of his cadillac and into the vehicle which she was driving and handed her a crumpled piece of paper which she opened up and observed a small substance of white powder in same. (TR 13-14) She testified

that the Defendant told her that this was a sample of the stuff that she would be receiving later, when she gave him the two rings in exchange for same. Miss Young testified that she was to give Mr. Oliva two men's rings, one white gold and the other yellow gold with a cluster of diamonds. (TR 15) Miss Young testified that she put the crumpled paper in her pocketbook, and dropped Mr. Oliva at his home at which time she was told to pick him up in twenty minutes. She testified that she and Mr. Moore drove around approximately twenty minutes at which time they came back to the home of Mr. Oliva, and he then entered the car again, and while they were driving off, reached into his right pocket, and threw over the front seat a package of white powder which was tested by Mr. Moore, at which point the witness gave to Mr. Oliva the two rings. (TR 17-19)

The witness testified that Mr. Oliva told her that there was a little more than a quarter of an ounce and that she would be real pleased with it. She then folded the plastic bag back up, put it back on the car seat and eventually put it in her purse which was then returned to the surveiling unit. (TR 20)

The State then introduced for identification State's Exhibits I, II and II. (TR 21)

On cross examination, the witness testified that she came down to Key West at about 11:00 in the morning on September 5 with Special Agent, Larry Dollar. (TR 25)

State's Exhibit I for Identification, a ring, was shown to the witness at which point the witness admitted that she couldn't positively identify the ring as being the one that was given to the Defendant, and could only say that it

looked like the same ring that had been given. (TR 34) On re-direct examination, the witness testified that the ring that she eventually gave to the Defendant was given to her by a Florida Department of Criminal Law Enforcement Agent, Michael Brown (TR 36)

At which point, the State called its next witness, Arthur Moore. (TR 36) Mr. Moore testified that he was twenty one years old and employed at the present time by the Florida Department of Criminal Law Enforcement, and had been so employed for one and a half years, that he had worked for the Florida Department of Criminal Law Enforcement in Key West, Florida and was working for them on or about September 5, 1975. (TR 37) He testified that he had met the night before with the Defendant, OLIVA, in a bar on Duval Street, where he told the Defendant a lady would be down to do business with him the next day. (TR 39) He testified that the next day he met with the Defendant and the previous witness, Debby Young, at the tennis courts in Key West. (TR 41) He testified that when the Defendant got into the car he gave a crumpled piece of paper with a small quantity of white powder to Miss Young. (TR 41) The witness then testified that he drove the Defendant to his home, dropped him off, and when they came back twenty minutes later, they picked the Defendant back up, that he got into the rear seat of the car where Miss Young asked the Defendant if he had the stuff. The Defendant dropped it in the front seat where this witness picked it up, tasted it, snorted some, put some on his tongue to make sure that it was the same thing he had given them for the test. The Defendant then asked them for the rings, which he testified Miss Young passed to the Defendant from behind while still driving. (TR 44) The witness was shown State's Exhibit I for identification and positively identified the cluster ring based upon a jeweler's mark that he was told had been

previously put inside same. (TR 45) The witness then identified his initials on State's Exhibits II and III for identification. (TR 46-47) The witness then testified that he was being paid by the Florida Department of Criminal Law Enforcement for the work he was doing for them, and that he had been previously convicted of a crime. (TR 47-48)

On cross examination, Mr. James, counsel for Defendant, asked for certain proceedings to be held outside the presence of the jury. (TR 48) At such time, Mr. James requested of the Court if he could ask a question of Mr. Moore, the witness as to his address. The Court indicated that he was not going to permit Mr. James to ask that question, stating that Mr. James knew the Court's ruling on that. (TR 49) Mr. James then requested if he could go into the pending charges against Mr. Moore. The Court indicated it would permit him to ask if there are any pending charges, and the Court indicated that if his answer was he doesn't know, that the Court would not permit any further examination. (TR 49) At that time, the following colloquy occurred:

> "MR. JAMES: Therefore, it is the ruling of the Court if he says he doesn't know, I will not be allowed to go into the specifics of each and every charge?
>
> THE COURT: That is right.
>
> MR. JAMES: I would like to ask the question about the charges that were dropped against him as a result of his working these cases. I know the Court's earlier ruling on that, but again, I want to protect the record.

> THE COURT: I think his answers to those questions in that case was that he didn't know and that they were not.
>
> MR. JAMES: Yes Sir, but it would be my intention unless the Court prevents me.
>
> THE COURT: I won't let you go into that on cross. You can ask the question and lay the proper predicate and then when you get your case you want to show that he made an error in his testimony, you can present certain testimony.
>
> MR. JAMES: But I understand that the ruling of the Court at this time—
>
> THE COURT: I am not going to let you cross examine him on it if he denies it.
>
> MR. JAMES: I will take exception to all of the above rulings.
>
> THE COURT: Very well. Let the record so reflect.
>
> MR. JAMES: I would like to make a proffer as to the questions I would ask.
>
> THE COURT: I will permit you to make a proffer at the proper time.
>
> MR. JAMES: But I can't make the proffer now?
>
> THE COURT: No, not on cross examination. Bring the jury in."

Thereupon, the jury was brought in. (TR 48-51)

Mr. James then inquired of the witness that he had been paid by the Department of Criminal Law Enforcement for the past year and a half's work. Said question was objected to by the State. Objection was sustained by the Court. The question was then asked as to how much the informant had been paid for the Operation Conch cases in Key West. The State objected and the objection was sustained. Then the Defendant's counsel asked the witness how much he was paid for the case involving Abraham Thomas Oliva and he responded that he didn't remember nor did he remember if he was paid anything for that case. (TR 51-52) The counsel for the Defendant then asked if the witness had ever had any jobs until the time he was nineteen or twenty years of age. The question was objected to and the Court sustained the objection. The Defense then inquired as to if an income tax return had ever been filed by the witness. It was objected to by the State and sustained by the Court. (TR 53) Mr. Moore testified that there had been charges against him which were dropped, but he stated that he did not know the reason that the charges were dropped. (TR 55) Finally, the witness testified that he had never seen the bag which was State's Exhibit III in the actual possession of Mr. Oliva. (TR 57)

On re-direct, the witness testified that to the best of his recollection that he was getting somewhere between One Hundred Fifty ($150.00) and Two Hundred ($200.00) Dollars every couple of days from the Florida Department of Criminal Law Enforcement and that one time he received a Thousand ($1000.00) Dollars but never less than One Hundred Fifty ($150.00) Dollars. (TR 59)

The next witness called by the State was W. C. Griffith, a Special Agent for the State of Florida Department of Criminal Law Enforcement. (TR 60) The witness testified that on September 5, 1975, he arrested one Daniel Blanco, and at that time removed from the possession of Mr. Blanco, State's Exhibit I-D for identification which the witness then identified. (TR 61)

The next witness called by the State was George D'Allesandro, who was a Special Agent with the Florida Department of Criminal Law Enforcement and had been so employed for a period of five years. (TR 63) Agent D'Allesandro testified that on September 5, 1975, he was engaged in surveillance of narcotics activity. At such time he took certain photographs which were introduced as Composite Exhibit No. IV consisting of our photographs, A, B, C, and D which the Defense stipulated into evidence. (TR 63) The photographs were described as photographs of the Defendant entering the vehicle containing the witnesses Young and Moore. (TR 65-66)

On cross examination, the witness admitted that he at no time saw the Defendant pass State Exhibit III for identification to Miss Young. (TR 66) Further, he indicated that at no time did he see the witness Young pass State Exhibit for Identification No. I to Tom Oliva. (TR 67) The witness did testify that on Mr. Oliva's exit of the vehicle, he observed him wearing a ring on his pinky. (TR 68)

The next witness called by the State was Michael Brown. Mr. Brown testified that he was a Special Agent for the Florida Department of Criminal Law Enforcement and was so employed by that Department on September 5, 1975. (TR 70) He further testified that on September 5, 1975, the witness Deborah Young, gave him some packages

of white powder, which he identified as State Exhibit III for Identification. (TR 70) Upon presentment by the State, the witness also identified the contents of State's Exhibit for Identification No. II. (TR 71)

The witness then stated that he took those two pieces of evidence, State Exhibits II and III for identification, placed same in the evidence locker of the Department of Criminal Law Enforcement in the Miami Field Office and had same transported to the Drug Enforcement Administration Laboratory in Miami. (TR 72)

Finally, the Defendant identified I for Identification as a ring he had purchased from L. Luria and Sons in Miami on August 18, 1975, which he testified he gave to Deborah Young. (TR 73) The State then moved State Exhibit I-D for Identification into evidence, over objection by the Defense. The Court overruled the objection and accepted the ring in evidence. (TR 74) On Motion of the State, the Court then put State's Exhibit II and III into evidence. (TR 74-75)

On cross examination, the witness testified that he gave the rings on the morning of September 5th to Miss Young, which had been in his brief case for several days. (TR 77) At which time, the State rested. (TR 81) A motion for directed verdict of acquittal was denied, at which time the defense called as its first witness the Defendant, Abraham Thomas Oliva. (TR 82)

The Defendant testified on September 5, 1975 he did not sell or deliver to Deborah Young any cocaine, nor did he receive two diamond cluster rings from Deborah Young on September 5, 1975.

On cross examination by the State the Defendant stated that he had met Miss Young on September 5, 1975 at the tennis courts on the corner of Atlantic and Reynolds. At that time, he was there for the purpose of meeting Arthur Moore. (TR 83) The defendant stated that Moore had indicated to him the night before that he would see him there and as such, merely went to the spot. (TR 85) The Defendant stated that the reason he had gone there was Moore had indicated that he might have something of value which the Defendant would be interested in buying and that Moore had in the past offered to sell him pieces of jewelry. (TR 85) The State then queried the Defendant concerning his vehicle, which was a 1975 cadillac automobile and inquired into his employment in 1975 to which the Defendant indicated he had been employed as a mechanic in a gas station. (TR 86) He further testified that he had stopped working at the garage when he broke his hip in a car accident on Roosevelt Blvd. in April of 1975. (TR 86-87) The State inquired as to how he made his payments on the car subsequent to April of 1975 and the Defendant responded through a disability insurance rider on his automotive policy. (TR 88) The State then asked the following question of the Defendant:

> "QUESTION: (Mr. Alvarez) Isn't it a fact that on August 20, 1975 a couple of weeks before you saw her (Young) at the Winn Dixie Parking Lot? You know where the Winn Dixie Parking Lot is? Do you know where it is?
>
> ANSWER: (Mr. Oliva) Yes.
>
> QUESTION: Didn't you see her on August 20, 1975 in the Winn Dixie Parking Lot?

MR. JAMES: Your Honor, I object. It is completely irrelevant whether he saw her or didn't see her.

THE COURT: Overruled. He has a right to test the credibility of the witness.

ANSWER: Did I see her? Yes, I did see her.

QUESTION: (Mr. Alvarez) You just testified that you had never seen her before. August 20 is prior to September 5th. Do you understand that?

ANSWER: Yes, I'm sorry.

QUESTION: So you saw her on August 20.

ANSWER: That's right.

QUESTION: What did you see her about on August 20?

MR. JAMES: Objection, Your Honor. It is completely irrelevant.

THE COURT: He first testified he had never seen her before, now he admits that he saw her. Overruled, Answer the Question.

MR. JAMES: I object on the grounds that he is exceeding the scope of direct examination. I asked two questions strictly pertaining to September 5th, and he is limited on cross to matters that were gone into on direct.

THE COURT: He can test the credibility of the witness. Overruled. Answer the question." (TR 88-90)

Thereafter, the State inquired into the transaction on August 20, 1975, and alleged the conversation on that date with Deborah Young and Arthur Moore in the Winn Dixie Parking Lot and alleged that the Defendant had offered to sell cocaine at that time to Deborah Young and Arthur Moore, all of which was denied over objection by the Defendant. (TR 93) Upon the final objection of the Defense counsel, the court made this comment:

"THE COURT: I think you have gone far enough. Sustain the objection." (TR 93)

The State then asked the following question again:

"Let me ask you this. Specifically, on August 20, 1975, did you offer to sell Debbie Young cocaine in the Winn Dixie Parking Lot in exchange for the rings?

ANSWER: No.

QUESTION: Didn't you, in fact, sell her cocaine on August 20, 1975 in exchange for money?

MR. JAMES: Objection. We have gone into the complete thing of August 20. It is completely irrelevant to this issue.

THE COURT: Overruled. Answer the question.

ANSWER: No, I did not."

The entire transcript thereafter (TR 94-97) becomes replete with references to the transaction of August 20th and allegations of prior dealings between the parties all over objection of counsel. The State then moved its questioning into an area of how the Defendant made his living expenses and the following colloquy occurred in page 102 of the trial transcript:

> "QUESTION: (Mr. Alvarez) Does Mr. James (Defense counsel) pay for your expenses?
>
> ANSWER: I think that is none of your business.
>
> QUESTION: (Mr. Alvarez) Yes Sir, on the street selling cocaine, that is everybody's business.
>
> MR. JAMES: Object and move for a mistrial based on this whole line of questioning.
>
> THE COURT: Overruled. Proceed."

There being nothing further by Mr. Alvarez, there was no re-direct. The defense rested.

The State then called for rebuttal witness, Debbie Young. (TR 102) At said time, State's witness Young testified that the Defendant had delivered to her a quantity of cocaine on August 20, 1975. An objection was made. A Motion for Mistrial was made. The objection was overruled and the Motion denied. (TR 103) This line of questioning continued to the rest of the redirect. (TR 102-105)

Whereupon, a charge conference was held in Chambers. (TR 105-106) Thereafter, the State made its final argument to the jury. During the final argument, Mr.

Alvarez, the Prosecutor stated: "I urge you to send him a message, to let him know you just can't go around the city of Key West, and the county of Monroe and peddle cocaine, or, if you do, you have to be prepared to face the consequences." (TR 121-122) Said statement was objected to as being prejudicial comment with regard to both August 20 and September 5 at which time the Court overruled the objection and the Motion for Mistrial.

At which point, the Defendant began his summation.

During the Defendant counsel's summation, Defendant counsel made argument that if Defendant had ever handled the packages containing the contraband and passed these packages to the State's witness, they would have had fingerprints on same. The State objected to this argument, the Court sustained it, and requested the jury to disregard it, and told the defense counsel to confine himself to the evidence. (TR 124)

The jury was instructed and the charge was objected to by counsel for the defendant. (TR 137)

The jury returned a verdict of guilty as aforesaid.

REASONS FOR GRANTING WRIT

—I—

IT IS A VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS TO ALLOW THE STATE TO INTRODUCE PREJUDICIAL EVIDENCE CONCERNING A PRIOR TRANSACTION BETWEEN THE PARTIES WHICH WAS INTRODUCED SOLELY FOR THE PURPOSE OF SHOWING THE BAD CHARACTER OF THE DEFENDANT

During the Trial, after the State had rested and during the defense case, the Defendant testified on direct that on September 5, 1975, he did not sell or deliver to Deborah Young, any cocaine, nor did he receive diamond cluster rings from Deborah Young on September 5, 1975. (TR 82) On cross examination by the State, the State through Mr. Alvarez engaged in the following colloquy:

> "QUESTION: (Mr. Alvarez) Isn't it a fact that on August 20, 1975, a couple of weeks before you saw her (Young) at the Winn Dixie Parking Lot? You know where the Winn Dixie Parking Lot is? — Do you know where it is?
>
> ANSWER: (Mr. Oliva) Yes.
>
> QUESTION: Didn't you see her on August 20, 1975 at the Winn Dixie Parking Lot?
>
> MR. JAMES: Your Honor, I object. It is completely irrelevant whether he saw her or didn't see her.

> THE COURT: Overruled. He has a right to test the credibility of the witness.
>
> ANSWER: Did I see her? Yes, I did see her.
>
> QUESTION: (Mr. Alvarez) You just testified that you had never seen her before. August 20 is prior to September 5th. Do you understand that?
>
> ANSWER: Yes, I'm sorry.
>
> QUESTION: So you saw her on August 20.
>
> ANSWER: That's right.
>
> QUESTION: *What did you see her about on August 20?* (Emphasis ours)
>
> MR. JAMES: Objection, Your Honor. It is completely irrelevant.
>
> THE COURT: He first testified he had never seen her before, now he admits that he saw her. Overruled. Answer the Question.
>
> MR. JAMES: I object on the grounds that he is exceeding the scope of direct examination. I asked two questions strictly pertaining to Sept. 5th, and he is limited on cross to matters that were gone into on direct.
>
> THE COURT: He can test the credibility of the witness. Overruled. Answer the question." (TR 88-90)

Thereafter, the State inquired in depth into a transaction which occurred on August 20, 1975, and alleged that the conversation on that date with Deborah Young and Arthur Moore in the Winn-Dixie Parking Lot and alleged that the Defendant had offered to sell cocaine at that time to Deborah Young and Arthur Moore, all of which was denied over objection by the Defendant. (TR 93) Upon the final objection of the Defense counsel, the Court made this comment:

> "THE COURT: I think you have gone far enough. Sustain the objection." (TR 93)
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> The State then asked the following question again;
>
> "LET me ask you this. Specifically, on August 20, 1975, did you offer to sell Debbie Young cocaine in the Winn-Dixie Parking Lot in exchange for the rings?
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> ANSWER: No
>
> QUESTION: Didn't you in fact, sell her cocaine on August 20, 1975 in exchange for money?
>
> MR. JAMES: Objection. We have gone into this complete thing of August 20. It is completely irrelevant to this issue.
>
> THE COURT: Overruled. Answer the question.
>
> ANSWER: I did not."

After the Defense rested, the State called as a rebuttal witness, Deborah Young. (TR 102) At that time, to compound the injury already created, the State's witness Young testified that the Defendant had delivered to her a quantity of cocaine on August 20, 1975. This testimony was over objection, which objection was overruled. (TR 102-105)

The Supreme Court of Florida, in the landmark case of *Williams v. State, 110 So2d. 654, (1959),* held that evidence of prior offenses, including arrests, incarceration, or conviction, is admissible if clearly relevant, and tends to show a common scheme or plan (or some other recognized exception). Such evidence should *not* be admitted if its purpose is merely to show bad character or a propensity on the part of the Defendant to commit crimes.

In the instant case, the detailed evidence concerning the alleged drug transaction of August 20, 1975 was admitted into evidence over defense counsel's repeated objections. Further, this activity occurred throughout the entire cross examination of the Defendant and was compounded by the recall of a State's witness at the end of the Trial. Certainly, the Defendant does not dispute that the Prosecution had a right to test his memory with regard to a prior meeting with a State's witness in terms of dates. However, the issue should have been closed when the Defendant admitted having met Miss Young on August 20 of 1975. At that time, Defendant's credibility had been appropriately impeached, Defendant had admitted the prior meeting, and the issue should have been closed. Instead, the overzealous prosecutor, aided by the Court, was allowed to delve into an entire different drug transaction of August 20 which was coming in solely for the purpose of showing the Defendant's propensity to sell cocaine and not for any other reason recognized under the *Williams* test. Thus it is clear that

throughout the trial, collateral evidence relating to the August 20 alleged drug transaction was elicited. The Defendant submits that this evidence was inadmissible under the *Williams* doctrine and did not fall within any of the recognized exceptions to the rule stated therein.

Marion v. State, 283 So.2d 53 (Fla. 4th Dist. 1973), Cert. Den. 287 So.2d 690 (Fla. 1973) reversed a conviction due to the introduction of collateral crimes evidence where the State failed to meet its burden of demonstrating that the prior offense was relevant to a factual issue and was not being introduced for the purpose of showing mere propensity of the Defendant to commit criminal acts. The only "common denominator" between the crime charged and the collateral crime was that both were robberies allegedly committed by an accomplice with a gun at night.

The Third District Court of Appeal has historically applied a test of uniqueness, and has done so as recently as *Beasley v. State, 305 So.2d 285 (3rd D.C.A. 1974)* where this Court held that the State only introduced evidence tending to show a mere similarity of offenses without regard to the singular manner of their perpetration. The Court went on to indicate that since there was nothing in the State's proof which indicated that there was anything particularly unique or unusual about the manner in which the collateral crimes were committed, the introduction of the other crimes evidence created reversible error.

The evidence of the August 20 alleged sale, even were it deemed to be relevant to show a common scheme or plan, far surpassed permissible limits for which it was purportedly introduced when it became so detailed and abundant as to violate the Williams rule by transcending the bounds of

relevancy and making the latter offense a feature rather than an incident.

In *Lawson v. State, 304 So.2d 552 (3rd DCA 1974)* this Court reversed a conviction for murder where the collateral crimes evidence, which was found admissible under the motive exception, became a feature of the trial; the Court states at page 524:

> "But we believe that the detailed testimony concerning the actual modus operandi of the earlier offense and of the Appellant's role in its commission was irrelevant. This testimony could only tend to impress the jury that the Appellant was a bad character who had committed another crime . . ."

The feature limitation has consistently been applied by the Florida Supreme Court. *Ashley v. State, 265 So.2d 685 (Fla. 1972); Hirsch v. State, 279 So.2d 866 (Fla. 1973); State v. Davis, 290 So.2d 30 (Fla. 1974).*

Denson v. State, 264 So.2d 442 (1st DCA 1972) dealt with a question of a drug sale occurring on or about January 20, 1970 to an undercover agent. The agent testified in detail as how he met with the Defendant and arranged for the sale of the contraband. The First District pointedly noted:

> "There was no question as to the identification of the Defendant or the sufficiency of the evidence to sustain a jury verdict of guilty upon the transaction of (the January 20th) transaction.

Having established the elements of the January 20 sale, the State turned it's full attention to parading before the jury a full review of the Defendant's subsequent criminal conduct on January 21."

The Court, in reversing stated:

"It is the subsequent evidence adduced by an overzealous prosecutor which we find transformed this Trial of the Defendant for a heinous offense committed on January 20, 1970 from a feature into a side show . . . in some, the State of Florida tried Denson for crimes allegedly committed on January 21, 1970 and on October 21, 1970; crimes for which he had not been informed against or charged."

The same error occurred in the case at bar: Having testified in detail as to the sale of Sept. 5, the Defendant was cross examined in detail about a sale of August 20 wherein the Prosecutor attempted to give a detailed account of that day's events in almost as great detail as that of the Sept. 5 sale. The Defense counsel objected strenuously throughout. Additionally, the State called at the conclusion of the Defense case in rebuttal, Deborah Young, who testified in detail concerning the transaction of August 20.

> As was aptly pointed out by this Court in *Beasley, supra*
>
> "We think this case is another instance where the prosecutor earnestly seeks to introduce evidence of collateral crimes which have marginal relevance to the case at issue, but which does

> manage to impress upon the minds of the jurors that the Defendant has a propensity to commit crimes..."

Bearing this rational in mind, the Defendant finds himself relying on this Court's opinion in *Draten v. State, 292 So.2d 395 (3rd DCA 1974)* where this Court said:

> "In the case at bar, the only common denominator between the two crimes with which the Defendant was charged was that both incidents were allegedly committed during the hours of darkness by the accused and an accomplice with a gun. Thus we find that the State failed to demonstrate the requisite similarity and operation in the evidence of the prior similar offenses were being introduced only for the purpose of illistrating mere propensity in violation of the *Williams* rule... These are two separate and distinct crimes. One is not relevant. The evidence of one of the offenses would have no relevance or material bearing on an essential aspect of the other as required by *Williams*. One does not go to prove intent, common scheme, identity and certainly no general pattern as required by *Williams*. These are two separate and distinct crimes. The State went in for the overkill and in doing so committed reversible error..."

Thus, the Defendant submits that he is entitled to a reversal of his conviction and sentence and a new trial. The *Williams* rule error is especially damaging in this case where the Defendant never opened the door to the August 20 incident. Further, the alleged offense was not shown to have been committed in a singular manner in relation to the

crime charged and it has certainly become a feature of the trial below. *Williams v. State, supra; Drayton v. State, supra; Beasley v. State, supra.*

—II—

IT IS A VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS FOR THE TRIAL COURT TO ALLOW HIGHLY INFLAMMATORY AND PREJUDICIAL COMMENTS DURING CLOSING ARGUMENTS SERVING TO INFLAME THE JURY AND INDICATE TO SAME THE COURT'S BELIEF IN THE DEFENDANT'S GUILT.

During Final Argument, the Prosecutor stated:

> "I urge you to send him a message, to let him know you can't go around the City of Key West, and the County of Monroe, and peddle cocaine, or, if you do, you have to be prepared to face the consequences." (TR 121-122)

This comment was objected to as being prejudicial. The objection was overruled as was the subsequent motion for mistrial predicated upon such comment. Defendant submits that the comment was highly prejudicial to such an extent as it denied the Defendant his right to a fair trial.

The general law regarding prejudicial comments was set forth in *Frenett v. State*, 20 So.2d 849 (1947) wherein the Supreme Court said that a prosecutor should confine his argument to facts which are established by the record or which may be reasonably inferred from the facts established, and when he goes beyond that range, he takes the chance that he may thereby cause the necessity of the reversal of a favorable judgment.

In the case instanter, the commentary of the prosecutor did not constitute argument as to the facts which were established by the record or which may be reasonably inferred from the facts established. The nature of the prosecutorial comment was by means of threat to the jury. The prosecutor, in fact, was saying to the jury that they had to send a message to the Defendant or else he'll be put in the community selling cocaine.

The First District Court of Appeal dealt with a question similar to this in the case of *Simmons v. Wainwright*, 271 So.2d 464 (1st DCA 1973) wherein the Court made the following observation:

> "The closing argument by the State was highly inflammatory. The prosecuting attorney dwelled at length upon the irrelevant and immaterial testimony as to collateral crimes of Defendant and witnesses proffered by him, and concluded by admonishing the jury as follows:
>
> 'And this is where it stops, right in this Courtroom, tell Charlie Simmons and the rest of that roguey bunch down there — gang would be a better word — to stay out of this county, go out of here and convict him today on all four charges.'
>
> A Defendant in this jurisdiction is not entitled to a perfect trial, but is entitled to a fair trial. . ."

Specifically, the entire concept of giving a message to a Defendant was rejected by the Court in the *Simmons* matter. As was pointed out by the Fourth District Court of Appeal in *Breniser v. State*, 267 So.2d 23, (4th DCA 1972):

> ". . . Appealing to the sympathy of the jury. Such (conduct) is indeed improper, and while prosecutors should be commended for handling their duties with zeal, they would profit greatly by giving careful heed to the admonitions and restraints set forth in numerous time honored cases cited and discussed by (the Supreme Court) in *Grant v. State*. 194 So.2d, 612 (Fla. 1967).

A case almost totally on point with the one instanter is *Chavez v. State*, 215 So.2d 750 (2nd DCA 1968). In that case, Mr. Justice Mann stated:

> "If oratory comes, can reversal be far behind? In this case a zealous prosecutor, summing up to the jury, said 'This is your community. If you believe that the Deputy Booth is lying on the witness stand, if you think that he is mistaken, then you come in with a verdict of an acquittal, and let him go back out in your community and handle more morphine.'"

It is apparent, that there is not much difference between the statement of the prosecutor in that case and the argument of the prosecutor in the case instanter. In the case before this Court, the prosecutor urged a message to be sent and to let the Defendant know you cannot go around the City of Key West and the County of Monroe to peddle cocaine. The Court, in reversing the *Chavez* case stated:

> "The Appellant was convicted of unlawful possession of narcotics, precisely the offense he was charged with. There is nothing in the record from which we can tell whether the offensive remark, objected to by counsel, recognized by the Court as objectionable and sustaining the objection, and by the attorney general in argument here contributed to the conviction. . . . We think that in a case of this kind the only safe rule appears to be that unless this Court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused, the judgment must be reversed . . ."

Therefore, it is clear from the facts of this case and the law which applies thereto that the comment in closing by the Prosecutor, was of such a nature as to be so highly prejudicial as it deprived the Defendant of a fair trial. As such, the objection should have been sustained, a curative instruction given, and at that point, a mistrial should have been granted. However, the Trial Court overruled, improperly, the objection leaving this Court no other recourse but to do substantial justice and reverse the conviction based upon the prejudicial comment of the prosecutor.

—III—

IT IS A VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS, AND RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO UNREASONABLY RESTRICT DEFENDANT'S RIGHT OF CROSS EXAMINATION OF A STATE'S PRINCIPAL WITNESS.

Prior to the cross examination of the Defendant, Counsel for the Defendant asked that certain proceedings be held outside the presence of the jury. (TR 48) At such time, Mr. James requested of the Court if he could ask a question of Mr. Moore, the witness, as to his address. The Court indicated that he was not going to permit Mr. James to ask that question stating that Mr. James knew the Court's ruling on that. (TR 49) The State, on the record, made no ground for the objection, nor did it urge the Court that Moore was a confidential informant nor did the Court claim any danger to Moore. It also did not indicate that it felt that the witness was in danger. Inasmuch as Moore was a vital witness whose credibility was the foundation of the State's case, it is submitted that the Court's ruling constituted reversable error.

In the landmark decision of *Alford v. United States*, 282 U.S. 687, (1931), the Defendant, on trial for fraud, when a Government witness, who inferentially was a former employee of the Defendant, testified and gave against the Defendant damaging testimony. On cross examination, the Defendant attempted to elicit the witness' place of residence. This attempt was unsuccessful. The Supreme Court of the United States, in reversing the Defendant's

conviction, held that cross examination was a matter of right and that one of its permissable purposes was to enable a Defendant to identify a witness against him from within his community so that:

> "the jury may interpret his testimony in the light reflected upon it by knowledge of his environment."
> 282 U.S. at 691.

The Court then held:

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross examination. For that reason, it is necessarily exploratory and the rule that the examiner must indicate the purpose of his inquiry does not in general, apply . . . It is the essence of a fair trial that reasonable latitude be given the cross examiner even though he is unable to state to the Court what facts a reasonable cross examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them . . . To say that prejudice can be established only by showing that the cross examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."
> 282 U.S. at 692.

It is apparent in reading the *Alford* case that the defense counsel had reason to believe that the witness was in

custody at the time of the trial, but, such reason was clearly not important in light of the Supreme Court's holding as hereinabove cited. The Court further stated:

> "The question, where do you live, was not only an appropriate preliminary to the cross examination of the witness, but on its face without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which the cross examination may always be directed."
> At 693.

See also *Wallace v. State*, 41 Fla. 547, 26 So. 713 (1899), cited by the Court in *Alford*.

The United States Supreme Court made fully applicable the *Alford* decision in *Smith v. State of Illinois*, 390 U.S. 129, (1968), which was a case arising out of a State conviction. This case dealt with a sale of narcotics in which the undercover informant was the chief prosecution witness whose credibility was "the only real question at the trial. . . ." *at 130.* He alone testified that he had purchased the drugs from the Defendant, Smith, with marked funds furnished by the police. Although there was partial corroboration of his testimony by police during the cross examination, he admitted that the name he had given was not an accurate one. The Defendant, through counsel, attempted to inquire into the true identity of the informant, and was not allowed. Later, the informant was asked his address but the trial court sustained the State's objection. The record in the case indicated that the Defendant and counsel knew the informant (indeed, the Defendant's co sel had once represented the informant), and there was no showing that either knew where he was living at the time of the trial.

Thus, the facts in *Smith*, are virtually identical to those in the instant case. The Supreme Court in a holding totally conclusory with regard to this issue, reversed and said:

> "In the present case, there was not, to be sure a complete denial of cross examination, but the Petitioner was denied the right to ask the principal prosecution witness either his real name or where he lived, although the witness admitted that the name he had first given was a false. Yet, when the credibility of the witness is in issue, the very starting point in "exposing the falsehood and bringing out the truth" through cross examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in Court examination and out of Court investigation. To forbid this most rudimentary inquiry at the threshhold is effectively to emasculate the right of cross examination itself." *330 U.S. 131*

The Seventh Circuit, in an opinion written by now Justice John Paul Stevens, in following the *Smith* case, held in *United States v. Ott, 489 F. 2nd 872 (7th Cir. 1973)* and held at 875:

> "Given the necessity of permitting counsel to begin an adequate cross examination . . ., the scope of discretion is more limited at that point than after an adequate foundation has been established."

Recently, Florida courts have addressed the same issue. The *Hassberger v. State* decision of the Fourth District, found at *321 So. 2d 577, 580 (4th D.C.A., 1975)*,

reversed a defendant's drug sale conviction where the Defendant had been refused the right of cross examination in terms of eliciting the names and address of the testifying confidential informant. The Court stated therein:

> "It follows that when a witness testifies for the State, the burden shifts to the state to prove reasons why the Defendant should not be able to cross examine a witness as to his real name and address. There must be a strong state interest."

It is noteworthy in the instant case, that no justification was offered by the Court or the State to show why Arthur Moore's address should not be revealed. The Court, in *Hassberger* went farther than is necessary here in holding that simply to aver that a witness is in danger does not automatically protect him from being identified, for here, there was not even that argument of danger by the State.

In addition to the reasoning supplied by *Smith* and *Alford*, the *Hassberger* Court gave another basis for its ruling that an informant's name and address must be disclosed; the Court cited Rule 3.220(c) (2), FRCrP:

> "(2) Informants. Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial, or a failure to disclose his identity will infringe the constitutional rights of the accused."

The Court concluded as follows at 584:

> "And so the mandate of the Florida Rule of Criminal Procedure 3.220, and the crucial consideration that the Defendant has been denied his

> right to meaningfully cross examine a witness against him in contravention of the Sixth Amendment, requires reversal for a new trial with directions that the Defendant be permitted to elicit the name and address of the informant/witness should the state choose to call him to the stand."

Clearly, the trial court's ruling below constituted constitutional error which mandates a reversal and a remand for new trial. *Smith v. Illinois, supra.*

The State's case rests to a great extent upon the credibility of the confidential informant, Arthur Moore. The eventual verdict, in fact, showed a lesser included offense conviction as to Count II which dealt with the State's witness Debbie Young, and a conviction for sale to the confidential informant, Arthur Moore. It was crucial that the defense be able to illustrate through cross examination, that Arthur Moore was unworthy of belief by the jury, that he had an interest, bias or improper motive in testifying as he did, and that his credibility was subject to attack. Yet, throughout the trial, defense counsel's efforts to do just that were constantly hampered by the Trial Court. This point on Appeal relates to those errors of the Trial Court in restricting cross examination and refusing to permit proffers of evidence so as to create a proper record for purposes of Appeal.

In *Pointer v. State of Texas*, 380 U.S. 400, 403 (1965), the United States Supreme Court held the Sixth Amendment right of an accused to confront the witnesses against him is a "fundamental right . . . made obligatory on the States by the Fourteenth Amendment." The Court stated:

> "It cannot be seriously doubted at this late date that the right of cross examination is included in the right of an accused in a criminal case to confront the witnesses against him."

In *Brookhart v. Janis*, 384 U.S. 1 (1966), the Court held:

> "A denial of cross examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice, would cure it."

Throughout the history of judicial rulings in the State of Florida, our Supreme Court has recognized that the right of cross examination stems from the constitutional guarantee that an accused person shall have the right to be confronted by his accusers. *Coco v. State, 62 So. 2d 892 (Fla. 1953)*

The Courts of Florida have steadfastly adhered to this principal:

> For the purpose of discrediting a witness, a wide range of cross examination is permitted, as a matter of right, in regard to his motives, interests, or animous, as connected with the cause or with the parties thereto, upon which matters he may be contradicted by other evidence . . . *Simmons v. Wainright, 271 So. 2d 464 (1st DCA 1973).*

In *Simmons*, the reversal was mandated where the Trial Court restricted the defense in its attempts to impeach the credibility of the witness by examining her as to motive and ill-feeling toward the Defendant. The witness was a

principal witness for the State. See also *Anderson v. State, 314 So. 2d 803 (3 DCA 1975)* wherein this Court found "reversible error since effective cross examination of the State's key witness was precluded . . ."

With these basic tenets in mind, it is submitted, that the Trial Court below committed reversible error when it denied Counsel for the Defendant to go into pending charges against the witness, Moore, (TR 49) and further denied the Defendant's counsel the right to make a proffer as to the questions he would be desirous of asking. (TR 48-51)

Further, during the cross examination of the principal witness, Court sustained objections to prior employment of the witness and the filing of income tax returns by the witness. (T. R. 53) A reading of the transcript indicates the lengthy colloquy set forth in detail in our brief as part of the statement of facts which occurred between the trial court and counsel for the Defendant, immediately preceding the cross examination of the witness, Arthur Moore. During this colloquy, it became patently clear, that Mr. James as counsel for Defendant wished to discuss evidentiary matters with the Court outside the presence of the jury, in order not to disrupt the trial and to establish said grounds upon which he could proceed. During this side bar conference, Mr. James indicated that he wished to go into pending charges against the witness, the reasons they were dropped, and other matters for which he sought to make a proffer. His right to make a proffer was denied by the Trial Court. Where a Trial Court refuses a Defendant's right to make a proffer of testimony, the First District Court of Appeal in *Piccirrillo v. State, 329 So. 2d 46 (1st DCA 1976)*, the Court said:

> "A trial court should not refuse to allow a proffer of testimony. This is necessary to insure a full and effective appellate review. *Francis v. State, 308 SO. 2d 174 (1st DCA 1975).* We are compelled to reverse."

Thus, where Defendant submits that absent the requested proffer, this Court is unable to fully evaluate the relevance of any questions sought to be asked by counsel for the Defendant, this Court may not hazard a guess on said subject and in fact, reversible error is committed by the Trial Court.

During the cross examination of Mr Moore, the defense was precluded from asking the witness questions concerning pending charges and also State's objections were sustained as to prior employment and filing of income taxes. It was implicit within the record that said questions were being asked for purposes of impeachment.

It must be recalled by this Court that Arthur Moore was a paid informant, and that he was the principal State's witness in this matter. The only other testimony relating to the transactions came from the witness, Debbie Young. However, those charges which related to any transactions with Miss Young were returned by the jury as lesser included offenses in this matter. But, even assuming arguendo, that the corroborative testimony of Young was material, such corroboration could not vitiate the Defendant's constitutional right to impeach this key witness' credibility by showing the jury he had improper motives in testifying as he did. *Simmons v. Wainright, Supra, at 465. Lee v. State, 318 So. 2d 431 (4th DCA 1975)* is a leading case on this point. There, the State's case rested on the testimony of a paid informant employed by the Sheriff's office. The informant, as in the case instanter, was wired with a bugging device, and was, in fact, monitored by a police officer who was concealed during the drug transaction. Prior to the trial, the informant had been arrested and charged with a criminal offense. The State filed pre-trial motions to preclude expected cross examination of the informant on the pending charges and the Motion indicated no deals or promises had been made to the informant regarding the pending charge. Further, the motion indicated that questions on the charge could result in unintended immunity for the informant. In addition thereto, the State claimed that some forty (40) to sixty (60) other narcotics cases which hinged on informant's testimony, would have to be abandoned. The Trial Court sustained the State's objection to the informant's being asked if he had a pending robbery charge. The Defendant, in *Lee*, ascerted that he had "an absolute right to bring that evidence out on cross examination" to impeach the informant regarding his present "bias, motive or interest in giving his testimony." *318 So. 2d at 432.*

The State urged that "no deals" were made for the informant's cooperation and that the pending charge was not drug related. In rejecting the State's claim, the Court phrased the issue presented as follows:

> "Could a witness who has operated as a paid informant for a Sheriff's Office on numerous drug buys and who, between one of these buys and its prosecution is himself charged with a crime of robbery, which is pending at the time he is called by the State to testify in the drug case, be materially influenced or biased in the giving of his testimony by the fact of his being so charged.

The answer is clearly yes, and the reasons are more aptly set out in the dicta in the *Morrell case, Supra, 318 So. 2d at 432."*

The Court was referring to the decision in *Morrell vs. State, 297 So. 2d 579 (1st DCA 1974),* wherein the First District stated in dicta:

> "It is clear that if a witness for the State was presently or recently under actual or threatened criminal charges or investigation leading to such criminal charges, a person against whom such witness testifies in a criminal case has an absolute right to bring those circumstances out on cross examination or otherwise so that the jury will be fully apprised as to the witness' possible motive or self interest with respect to the testimony he gives. Testimony given in a criminal case by a witness whom himself is under actual or threatened criminal investigation or charges may well be biased in favor of the State without the knowledge of such bias by the police or prosecutor because the witness may seek to curry their favor with respect to his own legal difficulties by furnishing bias testimony favorable to the State.
>
> The constitutional right to confront one's accuser is meaningless if a person charged with wrongdoing is not afforded the opportunity to make a record from which he could argue to the jury that the evidence against him comes from witnesses whose credibility is suspect because they themseleves may be subjected to criminal charges if they fail to 'cooperate' with the authorities. See *Davis v. Alaska. . . . "*

The *Lee* Court expressly adopted this dicta in arriving at it's conclusion that the Trial Court erred reversibly in not permitting testimony concerning the existence of a pending charge against the informant. It is to be noted that in the case at bar, no claim of immunity or self incrimination came from the witness, nor was there any statement by the prosecution as in *Lee* that no deals or other promises has been made to the witness in return for his testimony. Even had there been an immunity claim, any certainty or uncertainty of the immunity statute cannot defeat the Defendant's constitutional right to confront the witness. The *Lee* Court further noted that even if the informant had committed an act of misconduct, this would not be proper attack on its credibility insofar as the misconduct was not at issue; this however does not cover the claim of possible bias, which the defense sought to admit to provide a basis for an inference of undo pressure on the witness, due to the pending charge.

This holding is supported by the long standing decision of the United States Supreme Court in *Alford v. United States, 282 U.S. 687 1931)* where the Court held:

> "Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross examination that his testimony was affected by fear or favor growing out of his detention."

The Court rejected the Trial Court's reasoning that evidence of a pending charge against the Government witness was inadmissable because of the presumption of innocence. The identical reason was give by the Trail Court instanter and must be likewise rejected.

The *Lee* holding was recently cited and reaffirmed by the Florida Supreme Court in *Fulton v. State, 335 So. 2d 280, 283 (Fla. 1976)*, wherein the Court stated:

> "When a prosecution witness is under criminal charges at the time he testified the Defense is entitled to bring this out."

The Court then quoted from the *Morrell* decision holding that if a State witness has pending criminal charges at the time he testifies, the Defendant has an absolute right to bring those circumstances out on cross examination. *Fulton*, supra, at 284.

Just as in *Lee, Morrell, Alford and Fulton*, supra, the Defendant here was entitled to impeach Moore by revealing the pending charges and arguing to the jury that Moore was motivated by an interest in cooperating with the police. This Court reversed an extortion conviction very recently due to a restriction of the cross examination of the victim on the subject of a pending civil suit. In that case, Defendant's counsel attempted to demonstrate why the victim would fabricate her testimony:

> "Counsel attempted to ask the victim about the existence of a civil suit pending against the Appellant for his alleged misconduct. However, all of these attempts were rejected by the Trial Court as being irreleveant, immaterial, and collateral to the matters before the Court. *Stradtman v. State, 334 So. 2d 100, 101 (3rd DCA 1976.)*

In reversing the Trial Court's judgment and conviction, this Court held:

> ". . .it is a well recognized rule that limiting the scope of cross examination in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony constitutes error, especially where the cross examination is directed to the key prosecution witness.

This rule is fully applicable in the instant case. Important for this Court to consider is the very recent decision of the Second District Court of Appeal in *Webb v. State, Case No. 75-1355 So. 2d (Fla. 2nd DCA 1976)* where the Defendant was precluded from showing bias on the part of the chief prosecution witness, the undercover agent in the sale of marijuana case. The Court in *Webb* held:

> "Bias or prejudice of a witness has an important bearing on his credibility, and evidence tending to show such bias is relevant . . . There was no corroboration of the inculpatory portions of [his] testimony and it was essential that the jury hear any admissible evidence bearing on his credibility. (Slip opinion, pp. 3-4).

It is further important to note that in particular in this case, where additional inquiry was cut off into areas of the financial status of the witness, whether or not he had held jobs and whether or not he had filed tax returns, also went to his bias and motive in testifying. The witness conveniently, suffered lapses of memory when being questioned as to his pay as a confidential informant, and Defense counsel was clearly trying to establish motive, interest and bias in terms of his questioning to show that the witness may have testified or fabricated testimony based upon the financial rewards of working as an undercover confidential infor-

mant. It is submitted that all of the above cited cases and authorities support this proposition in addition.

The Defendant submits that these errors, separately and considered together, compel a reversal of the conviction and sentence in this case.

CONCLUSION

For the above reasons, it is submitted that this Court grant a Writ of Certiorari and enter it's Order quashing the decision hereby sought to be reviewed and granting such other and further relief as shall seem right and proper to this Court.

RESPECTFULLY SUBMITTED,

ALVIN E. ENTIN, ESQ.
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Tel: (305) 949-5262

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was furnished by mail to the Office of the Attorney General, Sunset Executive Center, 8585 Sunset Drive, Suite 75, Miami, FL 33143 this 12th day of August, 1977.

ALVIN E. ENTIN, ESQ.

Appendix

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1977

CASE NO. 76-1226

ABRAHAM THOMAS OLIVA,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.

Opinion filed June 7, 1977.

An Appeal from the Circuit Court for Monroe County, W. Lamar Rose, Judge.

Alvin E. Entin, for appellant.

Robert L. Shevin, Attorney General and Margarita Esquiroz, Assistant Attorney General, for appellee.

Before HENDRY, C.J., and PEARSON, J., and CHARLES CARROLL (Ret.), Associate Judge.

PER CURIAM.

Abraham Thomas Oliva appeals his conviction pursuant to a jury verdict of one count of the sale of cocaine and one count of possession of cocaine. The transactions presented by the counts were separate. The proof of Oliva's guilt was overwhelming. The points presented on this appeal claim errors during the trial of the charges, which Oliva claims deprived him of a fair and impartial trial. They are: (1) the State was allowed, over objection, to present prejudicial evidence of a prior criminal transaction between the parties; (2) the court wrongfully restricted defendant's right to cross-examine a witness; and (3) the court erred in failing to grant defendant's motion for a mistrial because of an improper comment by the prosecutor during closing argument.

The circumstances out of which the first point is presented were that the defendant took the stand in his own behalf. On cross-examination, he testified that until the date of the alleged sale he had never seen Debbie Young, the State's witness who had testified that he sold her cocaine. In addition, he testified that he had never given her cocaine and that he had never bought anything of value from Arthur Moore, another State's witness. The trial judge was well within his discretion in allowing the State to show a prior meeting of the parties at which it was proved that the defendant negotiated with Young and Moore and furnished them with a sample of cocaine. It was further brought out on cross-examination and in the State's case on rebuttal that on the prior occasion the defendant had received cash from Young and Moore.

The cross-examination of the defendant and the subsequent rebuttal by the State was proper under the rule stated in Dabney v. State, 119 Fla. 341, 161 So. 380 (1935); and Fla. R. Crim. P. 3.250. See also the rule in Matera v. State,

218 So.2d 180 (Fla. 3d DCA 1969). Even if the cross-examination of the defendant and subsequent rebuttal testimony should be held to be within the scope of the "other crimes" rule set forth in Williams v. State, 110 So. 2d 654 (Fla. 1959), the evidence would meet the test of the Williams rule because the evidence showed a method of operation which was the same as that employed in the sale with which defendant was charged. Cf. Crespo v. State, ____So. 2d_____(Fla. 3d DCA 1977), case no. 76-634, released April 5, 1977.[1]

In the above-cited Crespo decision, we dealt with a point similar to defendant's claim on this appeal, i.e., that the court wrongfully restricted defendant's right to cross-examine the witness. In Crespo, we held that the right of the defendant to cross-examine the prosecution witness in order for the jury to have the benefit of such evidence as might bear on the witness's bias or self-interest through the testimony given by him was violated where the defendant was precluded from cross-examining the witness concerning a criminal charge or prosecution then pending against him. In Crespo, the court sustained an objection to the question: "Do you have a charge presently against you now for carrying a concealed weapon?" We reversed that holding based upon the fact that the testimony of a witness under an actual or threatened criminal investigation or charge may well be biased in favor of the State because the witness may seek to curry favor with respect to his own legal difficulties. See Morrell v. State, 297 So. 2d 579 (Fla. 1st DCA 1974).

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[1]See also the companion case, Crespo v. State, So. 2d (Fla. 3d DCA 1977), case no. 76-772, released April 5, 1977.

In the present case, the court complied with the rule. Defendant was allowed to cross-examine the witness concerning his current employment, his lack of past employment, his previous convictions, prior addresses and the current charges pending against him. Defendant's point simply urges that he should have been allowed a more extensive cross-examination. We hold that the extent of the cross-examination was adequate to inform the jury fully of the history of the witness and the fact that he had a pending charge against him, the trial of which had been delayed possibly in order to secure his testimony for the State at defendant's trial. The refusal of the trial court, after the facts were revealed, to allow defendant's counsel to exhaust the subject to his own satisfaction did not deprive the defendant of a fair trial. Cf. Ray v. State, 262 So. 2d 475 (Fla. 3d DCA 1972).

Defendant's claim that he was prejudiced by the nondisclosure of the present address of the paid informer witness has been disposed of adversely to the defendant in Crespo v. State,_____So. 2d_____(Fla. 3d DCA 1977), case no. 76-634, released April 5, 1977.

Defendant's point claiming error upon the court's failure to grant a mistrial because of a claimed improper comment by the prosecuting attorney during closing argument does not present reversible error. During closing argument, the prosecutor stated:

* * * * * *

"I urge you to send him a message, to let him know you just can't go around the City of Key West, and County of Monroe, and peddle cocaine, or that if you do, you have to be prepared to face the consequences."

The remark was improper because it was not a comment upon the evidence before the jury. See Frenette v. State, 158 Fla. 675, 29 So. 2d 869 (1947). Defendant immediately moved for a mistrial. No curative instruction was sought. The question remains: Was the remark so prejudicial as to constitute the denial of the motion for mistrial reversible error? We hold that it was not of such a nature so as to poison the minds of the jurors or to prejudice them so that a fair and impartial verdict could not be rendered. See Johnsen v. State, 332 So. 2d 69 (Fla. 1976). Cf. Wingate v. State, 232 So. 2d 44 (Fla. 3d DCA 1970).

Accordingly, the judgment and sentence are affirmed.

Supreme Court, U. S.
FILED
DEC 5 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

77-294

NO. 77-924

ABRAHAM THOMAS OLIVA,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

ROBERT L. SHEVIN
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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported as Oliva v. State, 346 So. 2d 1066 (Fla. 3d DCA 1977), and is printed in the petitioner's Appendix at A. 1-5.

QUESTIONS PRESENTED

The respondent respectfully rephrases the petitioner's Questions Presented as follows:

I and II

WHETHER THERE EXISTS AN ADEQUATE AND INDEPENDENT STATE GROUND SUFFICIENT TO PRECLUDE REVIEW BY THIS COURT OF THE ISSUE RAISED BY THE ALLEGED INTRODUCTION BY THE STATE OF TESTIMONY OF A PRIOR TRANSACTION (QUESTION I) AND BY THE DENIAL OF A DEFENSE MOTION FOR MISTRIAL MADE ON THE BASIS OF ALLEGEDLY IMPROPER PROSECUTORIAL ARGUMENT TO THE JURY (QUESTION II)?

III

WHETHER A REAL AND SUBSTANTIAL FEDERAL QUESTION, AS DISTINGUISHED FROM ONE DEVOID OF MERIT, FRIVOLOUS OR ABSTRACT, HAS BEEN PRESENTED BY THE COURT'S ALLEGEDLY UNDULY RESTRICTING CROSS EXAMINATION OF A STATE'S WITNESS?

STATEMENT OF THE FACTS

The respondent accepts the petitioner's Statement of the Facts as being substantially true and correct, but deems the following additional facts to be relevant to this Court's determination on the question of jurisdiction:

Before commencing his cross examination of State's witness, Arthur Moore, defense counsel asked the court if he could go into all the pending charges against Mr. Moore. The court replied:

> I will permit you to ask him if there are any pending charges against him. I will let him answer that question and if he

> says he doesn't know I am not going to permit further examination. I am making the same ruling I made before. (TR.49)

During the cross examination of Moore the following questions were asked and the following responses were elicited:

> Q. [By Defense Counsel] Are there any charges pending against you now?
>
> A. Not to my knowledge.
>
> Q. Were any charges dropped against you in return for your work for the Florida Department of Criminal Law Enforcement?
>
> A. There was but it was not for no work. Not for what I was doing on this behalf.
>
> Q. Why were they dropped then? What was the reason, if you know?
>
> A. I don't know. You would have to see them.
>
> Q. Who is them?
>
> A. Well, Chappell on the 3rd Floor and Les Garringer and

Rand Winter.

Q. Would you identify who Chappell is?

A. Judge Bill Chappell.

Q. Would you identify Les Garringer?

A. Assistant State Attorney.

Q. They are the ones that dropped the charges against you?

A. They nolle prossed them.

Q. That means they were dismissed or dropped?

A. Yeah.

Q. You say not to your knowledge was it in return for any work but out of the clear blue they dropped the charges.

A. Yeah.

[Defense Counsel]: Your honor, in light of the Court's earlier ruling, I will not pursue this line of questioning then. (TR. 55,56)

ARGUMENT

I and II

At the outset, the respondent would note that the petitioner has failed to cite even one federal decision in support of his argument in Question I that the issue raised by the alleged introduction by the State of testimony of a prior transaction warrants the exercise of this Court's jurisdiction. Similarly, the petitioner has failed to cite even one federal authority in support of his claim in Question II that the issue raised by allegedly improper prosecutorial argument warrants review by this Court. (See Reasons for Granting Writ in Petitioner's Brief, at 16-27)

This Court has adhered to the principle that it will not review judgments of state courts which rest upon adequate and independent state (or nonfederal) grounds, and many decisions evidence this Court's intention to scrupulously observe this long standing rule. See Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Holly v. Lawrence, 317 U.S. 518 (1943); McGoldrick v. Gulf Oil Corp., 309 U.S. 2 (1940); Kalb v. Feuerstein, 308 U.S. 433 (1943). That is, a review is precluded if the decision of the state court is upon a nonfederal ground or a point of local or general law sufficient to support the judgment, or where the question is one of

state practice or remedy. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, supra; United Gas Public Service Co. v. Texas, 303 U.S. 123 (1938); Kammerer v. Kroeger, 299 U.S. 302 (1937). Before this Court will entertain jurisdiction to review a judgment of a state court, it must affirmatively appear from the record not only that a real and substantial federal question was involved, but that the decision of the state court on the federal question was necessary to its determination of the cause. Black v. Cutter Laboratories, 351 U.S. 292 (1956); Durley v. Mayo, 351 U.S. 277 (1956); Wilson v. Cook, 327 U.S. 474 (1946). Stated differently, even where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this Court is without jurisdiction to review if the non-federal ground is independent of the federal ground and is adequate to support the judgment. Jankovich v. Indiana Toll Road Com., 379 U.S. 497 (1956); Fay v. Noia, 372 U.S. 391 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278 (1962); Black v. Cutter Laboratories, supra; Durley v. Mayo, supra. The policy behind these principles was clearly stated Herb v. Pitcairn, supra, at 125-126:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted.] The reason is so obvious that it has

> rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. [Emphasis supplied.]

In Lynch v. New York, 293 U.S. 52, (1934), this Court explained:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered

could not have been given without deciding it.

With regard to the issue that the trial court erroneously allowed the "introduction" of testimony of a prior transaction, it is evident that the decision below rests on adequate and independent state grounds, and that no federal question is involved. In rejecting the petitioner's contention on this issue, the court below set forth the pertinent facts appearing in the record and then ruled:

> The cross examination of the defendant and the subsequent rebuttal by the State was proper under the rule stated in Dabney v. State, 119 Fla. 341, 161 So. 380 (1935); and Fla. R. Crim. P. 3.250. See also rule in Matera v. State, 218 So. 2d 180 (Fla. 3d DCA 1969).
>
> Oliva v. State, supra, 324 So.2d at 1068.

The court below therefore based its decision upon a Florida rule of criminal procedure and case law which delineate the proper confines of cross examination and impeachment of the accused's testimony when he chooses to take the stand in his own behalf. See Fla. R. Crim. P. 3.250; Dabney v. State, 119 Fla. 341, 161 So. 3380 (1935). Rule 3.250 states in essence that when the accused becomes a witness in his own behalf, he is subject to cross examination as any other witness (provided,

of course, that his Fifth Amendment rights are protected). See Fla. R. Crim. P. 3.250. In Dabney v. State, supra, the Florida Supreme Court specifically stated the principle that

> ...if a defendant voluntarily takes the stand and testifies as a witness in his own behalf, then he becomes subject to cross-examination as any other witness and the prosecuting officer has the right to comment on his testimony, his manner and demeanor on the stand, the reasonableness or unreasonableness of his statements, and on the discrepancies which may appear in his testimony to the same extent as would be proper with reference to testimony of any other witness.
>
> Dabney v. State, supra, 161 So. at 381.

As reflected by the opinion itself, the petitioner in the present case untruthfully first testified that he had never before the September 5th meeting seen State's witness, Debbie Young. (TR 89, 90) Further, the petitioner testified under oath that he had never given cocaine to Debbie Young, as evidenced by the following excerpt from the record:

> Q. Did you hear Debbie Young testify today?

A. Yes.

Q. What she testified to is not true?

A. That I gave her cocaine?

Q. Yes.

A. That is wrong. I never gave that woman none. (TR. 89)

Further, the petitioner had also denied ever having bought anything of value from Arthur Moore (the confidential informant who accompanied Debbie Young) before the September 5th meeting, except for a gold chain which Moore offered to sell him on a prior occasion. That testimony was as follows:

Q. What did (Arthur Moore) he tell you?

A. He said to meet him over there at noon, that he wanted to show me something you might be interested in buying. (TR. 84)

* * * *

Q. You didn't ask him what it was?

A. He said he had something of value that I might be interested in buying.

Q. Have you ever bought things from him before?

A. No, I haven't.

Q. You never have?

A. No.

Q. This was the first time he offered to sell you anything?

A. No, it wasn't the first time.

Q. What else had he ever offered to sell you?

A. He offered to sell me a gold chain about six months ago, before this. (TR. 85)

Hence, based upon Florida rules governing the scope of impeachment of the accused's testimony as a test of his credibility, the court below ruled that the State could properly question the petitioner as to the nature of the August 20th meeting to bear on the credibility of his testimony at trial and on the believability of his version of the events, the petitioner having testified that he never gave cocaine to Officer Young. Oliva v. State, supra, 346 So.2d at 1067, 1068. It is clear therefore that the decision below rests on an adequate and independent state ground and that no federal issue of any sort is involved.

Moreover (as if this were not sufficiently convincing), the court below rested its decision upon an alternative state ground. Immediately following the ruling quoted above, the court below stated:

> Even if the cross-examination of the defendant and subsequent rebuttal testimony should be held to be within the scope of the "other crimes" rule set forth in Williams v. State, 110 So.2d 654 (Fla.1959), the evidence would meet the test of the Williams rule because the evidence showed a method of operation which was the same as that employed in the sale with which defendant was charged. Cf. Crespo v. State, 344 So.2d 598 (Fla.3d DCA 1977), case no. 76-634, released April 5, 1977. (Footnote omitted)
>
> Oliva v. State, supra, 346 So.2d at 1068.

In the landmark case of Williams v. State, 110 So. 2d 654, 663, (Fla. 1959), the Florida Supreme Court announced the rule of admissibility in Florida relative to evidence tending to reveal other crimes. In that case, the court held that such evidence is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern

of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried. Williams v. State, supra, 110 So.2d at 662. Hence, it is evident that even the alternate ground for decision constitutes an independant state ground and in no fashion is an issue of a federal nature involved. This Court is thus without jurisdiction to review a state court judgment which squarely rests upon a nonfederal ground. See, e.g., Henry v. Mississippi, supra; Herb v. Pitcairn, supra; Black v. Cutter Laboratories, supra (and other cases cited).

Similarly, with regard to the issue that the trial court erroneously denied petitioner's counsel's motion for mistrial made on the basis of allegedly improper prosecutorial argument to the jury, the decision below rests on an adequate and independent state ground which is sufficient to support the judgment, and no federal issue is necessarily involved. In rejecting the petitioner's contention on this issue, the court below first recognized the impropriety of the prosecutor's comment because it was not a comment upon the evidence before the jury, but then proceeded to phrase the issue before it as follows:

> Was the remark so prejudicial as to constitute the denial of the motion for mistrial reversible error?
>
> Oliva v. State, supra, 346 So.2d at 1068.

In ruling that the remark was not of such nature so as to warrant the declaration of a mistrial, the court below expressly rested its holding upon the Florida Supreme Court decision in Johnsen v. State, 332 So.2d 69 (Fla. 1976), and upon its own decision in Wingate v. State, 232 So.2d 44 (Fla. 3d DCA 1970). Bearing in mind that the issue was phrased by the court below as whether the remark called for the remedy of declaring a mistrial, it must be noted that in both the Johnsen and Wingate cases (on which the court below relied) the Florida courts set forth in detail the general rules in Florida governing the circumstances which necessitate the declaration of a mistrial. For instance, in Johnsen v. State, supra, the Florida Supreme Court quoted from the Florida harmless error statute and announced:

> The granting of a mistrial should be only for a specified fundamental or prejudicial error which has been committed in the trial of such a nature as will vitiate the result. (Citations Omitted)
>
> When such a fundamental or prejudicial error has been committed as will necessitate the granting of a new trial later, it is within the province of the trial judge, upon proper motion, to grant a mistrial at that point. However, when an alleged error is committed which does no substantial harm and the defendant

> is not materially prejudiced by the occurrence, the court should deny the motion for a mistrial. See Daugherty v. State, 143 Fla. 578, 197 So. 501, certiorari denied, [311 U.S. 648] 61 S.Ct. 44, 85 L.Ed. 414. The granting of a mistrial effectively stops the proceedings when fundamental or prejudicial error has been committed, to save the time and expense of further procedure in the trial; but a mistrial should not be granted when the error committed is not prejudicial to the substantial rights of the defendant.
>
> * * * *
>
> The objectionable remarks made by the prosecutor sub judice were not so prejudicial that no cautionary curative instructions give by the trial judge could negate their harmful effect. (Emphasis Supplied)
>
> Johnsen v. State, supra, 332 So.2d 71, 72.

Likewise, in Wingate v. State, supra, the Florida court had reasoned:

> Finally, the appellant contends that certain remarks by the prosecutor during closing argument were so highly prejudicial that the trial judge

should have granted a mistrial upon the motion of defense counsel. We cannot agree. As was stated in the case of Spencer v. State, Fla.1961, 133 So.2d 729, "The rule is that considerable latitude is allowed in arguments on the merits of the case."

* * * *

The trial judge, too, is afforded great latitude in his discretion to grant or deny a motion for mistrial. Eg., Furr v. State, 152 Fla. 233, 9 So.2d 801 (1942). In the case sub judice, the objectional comment was weighed by the trial judge as he determined whether the jury would be so prejudiced by the argument as to render a verdict different from one properly supported by the evidence and presentation of counsel. This determination was made by the trial judge from a position of experience and intimacy with the case which cannot be duplicated by any other tribunal. Eg., Bertone v. State, Fla. App. 1969, 224 So.2d 400. Thus, although the judge found the argument objectionable and sustained counsel's objection thereto, he did not feel that this small portion of argument recited by the prosecuting attor-

ney in her closing rebuttal statement to the jury was so inflammable and prejudicial as to require a mistrial. We are compelled to sustain the decision of the trial judge for the reasons expressed above. (Emphasis Supplied)

Wingate v. State, supra, 232 So.2d at 45, 46.

Hence, based upon the Florida rules delineating the circumstances which necessitate the declaration of a mistrial in the midst of a criminal trial, the court below ruled that the trial court had not committed error in denying such motion. As such, the decision below rests upon an adequate and independent state ground for decision which is sufficient to support the judgment, and no federal issue is necessarily involved in this ruling. In this regard, it must be remembered that this Court will not review state court decisions which rest upon a nonfederal ground or a point of local or general law sufficient to support the judgment, or where the question is one of state practice or remedy. Henry v. Mississippi, supra; Herb v. Pitcairn, supra; United Gas Public Service Co. v. Texas, supra; Kammerer v. Koreger, supra. Before this Court will entertain jurisdiction to review a state court judgment, it must affirmatively appear from the record not only that a real and substantial federal question was involved, but that the decision of the state court on the federal question was necessary to its

determination of the cause. Black v. Cutter Laboratories, supra; Durley v. Mayo, supra; Wilson v. Cook, supra. And even in cases where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this Court is without jurisdiction to review the judgment if the nonfederal ground is independent of the federal ground and is adequate to support the judgment. Jankovich v. Indiana Toll Road Com., supra; Cramp v. Board of Public Instruction, supra; Black v. Cutter Laboratories, supra; Durley v. Mayo, supra. In short, this Court will not entertain jurisdiction to review a state court decision, even though such decision is based upon both federal and state grounds, where the state ground is sufficient basis for the judgment rendered. Id.

The respondent submits that such in the case here. It is evident that the decision below does not involve a real and substantial federal question on the issue of the prosecutor's remark, and it is just as clear that no ruling on a federal question was necessary to determine the cause in this regard. Rather, the decision below may properly rest upon a state ground or rules which are completely independent of any federal ground, and which are amply sufficient basis to support the judgment rendered. Thus, no basis for jurisdiction is present.

III.

This Court has held that before it will entertain jurisdiction to review a judgment of a state court, it must affirmatively appear from the record that a real and substantial federal question, as distinquished from one devoid of merit or frivolous, was involved in the decision below. California Water Service Co. v. Redding, 304 U.S. 252 (1938); Valley S.S. Co. v. Wattawa, 244 U.S. 202 (1918); St. Louis & S.F. R. Co. v. Shepherd, 240 U.S. 240 (1917). This Court will not assume jurisdiction to review a state judgment where the asserted federal right is so wanting in foundation and so unsubstantial as to be devoid of all merit and frivolous, California Water Service Co. v. Redding, supra, Valley S.S. Co. v. Wattawa, supra, St. Louis & S.F.R. Co. v. Shepherd, supra, or where it is at most conjectural whether the party will be deprived of any constitutional right. Abrams v. Van Schaick, 293 U.S. 188 (1935). The mere averment of a federal question or some claim of constitutional right is not sufficient unless it can be shown that the question is a real one, and that there is a real and substantial controversy which deserves serious consideration. United States Fidelity & G. Co. v. Oklahoma, 250 U.S. 11 (1920); Sawyer v. Piper, 189 U.S. 154 (1902). Hence, although a question of federal law may be raised, review by this Court will not be warranted if it appears that the question is so absolutely devoid of merit as to be

frivolous, or has been explicitly foreclosed by a decision or decisions of this Court so as to leave no room for real controversy. Zucht v. King, 260 U.S. 174 (1922); Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902). This Court's limited reviewing power should therefore not be utilized to supervise adherence to its previous rulings on a factual, case-by-case basis. See Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

The petitioner in the present case has not presented a "substantial" federal question. Indeed, the issue presented by the petitioner is not only unsubstantial, but it has been foreclosed by prior decisions of this Court and leaves no room for real controversy.

Initially, the respondent takes issue with the petitioner's assertion that the credibility of State's witness Arthur Moore "was the foundation of the State's case." (See Reasons for Granting Writ in Petitioner's Brief, at 28) Indeed, State's witness Deborah Young was the police officer who purchased the narcotics from the petitioner while Arthur Moore was present. Ms. Young, the first witness for the prosecution, testified in detail as to the transaction she consummated with the petitioner. (TR. 10-36) In addition, Special Agent George D'Allessandro, who took photographs of the individuals involved during the transaction from a nearby location (TR 63), corroborated Young's and Moore's testimony to the extent to which he was able to observe the transaction from a distance.

(TR 83-68) Hence, the credibility of State's witness Arthur Moore, who was not the only witness to the transaction, cannot be so accurately described as "the foundation of the State's case."

Additionally, in Smith v. Illinois, 390 U.S. 129 (1968) and Alford v. United States, 282 U.S. 687 (1931), this Court was confronted with the same or similar claim as made by the petitioner herein. In Smith v. Illinois, supra, however, the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived although the witness admitted that the name he had first given was false. Quoting from Alford v. United States, supra, this Court expressed the following principles in holding that the petitioner had been deprived of his right of confrontation:

> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . .
>
> The question, 'Where do you live?' . . . was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.
>
> Smith v. Illinois, supra, quoting from Alford v. United States, supra, 282 U.S. at 692-694.

In addition to the fact that this Court's limited reviewing power should not be utilized to supervise the adherence to its previous rulings on a factual, case-by-case basis, it is evident that the court below adhered to the principles expressed in Smith v. Illinois, supra, and Alford v. United States, supra, and a substantial federal question that requires the exercise of this Court's jurisdiction has thus not been presented. The court below held in the present case held that the petitioner's claim of error arising from the non-disclosure during testimony of the present address of the informer witness had been disposed of adversely to him in its prior decision in Crespo v. State, 344 So.2d 598 (Fla. 3d DCA 1977). In Crespo, the court had expressly relied on Smith v. Illinois, supra, in rejecting the same contention against a similarly situated defendant. Specifically, the court stated in Crespo:

> Arthur Moore, a confidential informant, was a key witness for the prosecution. The ruling related only to his present address. Here the withholding of the present address of the witness Moore was not without some basis therefor in the interest of the witness and the State. Those factors may not have been of the kind sufficient to have justified the ruling, if disclosure of Moore's address had been essential in order for him to be properly placed in his environment. However, in this instance revelation of the then present address of the witness was not needed for that purpose. The defendant Crespo had known the witness Moore in Key West for seven or eight years. Moore and the defendant Ortega had lived and grown up together in the community of Key West, in which the trial was held. Thus, without his present address disclosed, the witness was sufficiently placed in his environment for the purpose of cross-examination, and as his environment might avail the jury in weighing his general credibility. (Emphasis added)
>
> Crespo v. State, supra, 344 So.2d at 599.

Thus, Crespo, which expressly adhered to Smith v. Illinois, supra, was the basis for the Court's disposition of the present issue. Hence, even if a federal question has been presented, it is devoid of merit and has been explicitly foreclosed by a prior decision of this Court so as to leave no room for real controversy. See Smith v. Illinois, supra, Alford v. United States, supra. Review by this Court is therefore not warranted. Zuch v. King, supra; Equitable Life Assurance Society v. Brown, supra.

The record in the instant case reveals that the petitioner on cross examination was able to place the witness Arthur

Moore in his environment and elicited testimony concerning the witness' record and background. (TR. 51-55) Arthur Moore had previously appeared on behalf of the State of Florida at several trials in Key West arising out of similar drug charges (TR. 48, 49), at which trials Moore had apparently given testimony against similarly situated defendants. At the time of the present trial, Moore was still in the employ of the Florida Department of Criminal Law Enforcement, for which he had been working for a period of a year and a half prior to trial. (TR. 37, 51) Moreover, the record reveals that there was no lack of knowledge on the part of the defendant as to the background of the witness. (TR. 51-55) Thus, the effect of the disclosure of the particular fact of Moore's address during cross examination would have been minimal since the petitioner was still able to place the witness in his proper setting during cross examination. See Smith v. Illinois, supra; Alford v. United States, supra. This effect must also be viewed in light of the fact that allowing such questioning would have tended to endanger the personal safety of the witness and might also have hampered him in the continuation of his activities, thus serving State and public interest. See, for example, United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973); United States v. Crockett,506 F.2d 759 (5th Cir. 1975).

In United States v. Smaldone, supra, the federal court held that where there was no lack of knowledge on the part of

the defendant as to the background of the witness, and defense counsel made no showing as to why he needed the witness' address, the witness did not have to disclose his address. Likewise, in United States v. LaBarbera, 463 F.2d 988 (7th Cir. 1972), the federal court held that the witness' present address did not have to be revealed on cross examination because:

> The record shows that Barr's testimony was the subject of extensive cross-examination by the defendants; although this is not dispositive of the issue raised on appeal, it does suggest that any prejudice to defendants was minimal. The disability inherent in the trial court's ruling was clearly outweighed by the necessity of protecting the witness Barr.
>
> United States v. Barbera, supra, 463 F.2d at 990.

Further, in United States v. Crockett, 506 F.2d 759 (5th Cir. 1975), the Fifth Circuit Court of Appeals, after citing Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), and Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), held

> the case in which a witness might be in physical danger to be an exception to the preference for disclosure.
>
> United States v. Crockett, supra, 506 F.2d at 762.

In United States v. Crockett, supra, the court noted that the defendants had demonstrated no prejudice since they were able to place the witnesses in their environment. The same is true of the case at bar. The petitioner has not demonstrated prejudice. Moore was placed in his environment during testimony.

Other federal court of appeals decisions have also denied to the accused disclosure of an informant's address when the witness could be placed in his environment or a threat to his safety existed. See, e.g., United States v. Ellis, 468 F.2d 638 (9th Cir. 1972); United States v. La Barbera, 463 F.2d 988 (7th Cir. 1972). In the instant case, where the petitioner's thorough and extensive cross examination was able to place the witness in his environment, where the witness's past and present employment as an informant indicated a threat to his safety if his address was disclosed, and where the record does not disclose that any prejudice accrued to the petitioner from not being allowed to question Moore as to his present address, the trial court was well within its discretion in denying petitioner's request that he be allowed to elicit such specific testimony from Moore. Thus, even if a federal question has been presented, such question is unsubstantial and devoid of merit, and has been foreclosed by prior decisions of this Court so that no real and substantial controversy which deserves serious consideration is present herein. This Court's exercise of jurisdiction is therefore unwarranted.

See United States Fidelity & G. Co. v. Oklahoma, supra; Sawyer v. Piper, supra; Zucht v. King, supra; Equitable Life Assurance Society v. Brown, supra; Rice v. Sioux City Cemetery, supra.

Finally, the petitioner's claim that it was error for the trial court to deny him the right to cross examine witness Moore as to pending charges is totally devoid of merit and frivolous, and clearly does not present a federal question that will warrant the exercise of this Court's jurisdiction. Indeed, the petitioner's claim is patently refuted by the redord of the proceedings.

Before commencing his cross examination of Arthur Moore, defense counsel asked the court if he could go into all the pending charges against Mr. Moore. The court replied:

> I will permit you to ask him if there are any pending charges against him. I will let him answer that question and if he says he doesn't know I am not going to permit further examination. I am making the same ruling I made before. (TR.49)

During the cross examination of Moore, petitioner's counsel was indeed allowed to question the witness as to pending charges and charges that had been dropped against him, as evidenced by the following colloquy :

In the present case, the court complied with the rule. Defendant was allowed to cross-examine the witness concerning his current employment, his lack of past employment, his previous convictions, prior addresses and the current charges pending against him. Defendant's point simply urges that he should have been allowed a more extensive cross-examination. We hold that the extent of the cross-examination was adequate to inform the jury fully of the history of the witness and the fact that he had a pending charge against him, the trial of which had been delayed possibly in order to secure his testimony for the State at defendant's trial. The refusal of the trial court, after the facts were revealed, to allow defendant's counsel to exhaust the subject to his own satisfaction did not deprive the defendant of a fair trial. Cf. Ray v. State, 262 So. 2d 475 (Fla. 3d DCA 1972).

Defendant's claim that he was prejudiced by the nondisclosure of the present address of the paid informer witness has been disposed of adversely to the defendant in Crespo v. State,____So. 2d____(Fla. 3d DCA 1977), case no. 76-634, released April 5, 1977.

Defendant's point claiming error upon the court's failure to grant a mistrial because of a claimed improper comment by the prosecuting attorney during closing argument does not present reversible error. During closing argument, the prosecutor stated:

* * * * * *

> "I urge you to send him a message, to let him know you just can't go around the City of Key West, and County of Monroe, and peddle cocaine, or that if you do, you have to be prepared to face the consequences."

The remark was improper because it was not a comment upon the evidence before the jury. See Frenette v. State, 158 Fla. 675, 29 So. 2d 869 (1947). Defendant immediately moved for a mistrial. No curative instruction was sought. The question remains: Was the remark so prejudicial as to constitute the denial of the motion for mistrial reversible error? We hold that it was not of such a nature so as to poison the minds of the jurors or to prejudice them so that a fair and impartial verdict could not be rendered. See Johnsen v. State, 332 So. 2d 69 (Fla. 1976). Cf. Wingate v. State, 232 So. 2d 44 (Fla. 3d DCA 1970).

Accordingly, the judgment and sentence are affirmed.

Supreme Court, U. S.
FILED
DEC 5 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

77-294

NO. 77-924

ABRAHAM THOMAS OLIVA,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported as Oliva v. State, 346 So. 2d 1066 (Fla. 3d DCA 1977), and is printed in the petitioner's Appendix at A. 1-5.

QUESTIONS PRESENTED

The respondent respectfully rephrases the petitioner's Questions Presented as follows:

I and II

WHETHER THERE EXISTS AN ADEQUATE AND INDEPENDENT STATE GROUND SUFFICIENT TO PRECLUDE REVIEW BY THIS COURT OF THE ISSUE RAISED BY THE ALLEGED INTRODUCTION BY THE STATE OF TESTIMONY OF A PRIOR TRANSACTION (QUESTION I) AND BY THE DENIAL OF A DEFENSE MOTION FOR MISTRIAL MADE ON THE BASIS OF ALLEGEDLY IMPROPER PROSECUTORIAL ARGUMENT TO THE JURY (QUESTION II)?

III

WHETHER A REAL AND SUBSTANTIAL FEDERAL QUESTION, AS DISTINGUISHED FROM ONE DEVOID OF MERIT, FRIVOLOUS OR ABSTRACT, HAS BEEN PRESENTED BY THE COURT'S ALLEGEDLY UNDULY RESTRICTING CROSS EXAMINATION OF A STATE'S WITNESS?

STATEMENT OF THE FACTS

The respondent accepts the petitioner's Statement of the Facts as being substantially true and correct, but deems the following additional facts to be relevant to this Court's determination on the question of jurisdiction:

Before commencing his cross examination of State's witness, Arthur Moore, defense counsel asked the court if he could go into all the pending charges against Mr. Moore. The court replied:

> I will permit you to ask him if there are any pending charges against him. I will let him answer that question and if he

> says he doesn't know I am not going to permit further examination. I am making the same ruling I made before. (TR.49)

During the cross examination of Moore the following questions were asked and the following responses were elicited:

> Q. [By Defense Counsel] Are there any charges pending against you now?
>
> A. Not to my knowledge.
>
> Q. Were any charges dropped against you in return for your work for the Florida Department of Criminal Law Enforcement?
>
> A. There was but it was not for no work. Not for what I was doing on this behalf.
>
> Q. Why were they dropped then? What was the reason, if you know?
>
> A. I don't know. You would have to see them.
>
> Q. Who is them?
>
> A. Well, Chappell on the 3rd Floor and Les Garringer and

Rand Winter.

Q. Would you identify who Chappell is?

A. Judge Bill Chappell.

Q. Would you identify Les Garringer?

A. Assistant State Attorney.

Q. They are the ones that dropped the charges against you?

A. They nolle prossed them.

Q. That means they were dismissed or dropped?

A. Yeah.

Q. You say not to your knowledge was it in return for any work but out of the clear blue they dropped the charges.

A. Yeah.

[Defense Counsel]: Your honor, in light of the Court's earlier ruling, I will not pursue this line of questioning then. (TR. 55,56)

ARGUMENT

I and II

At the outset, the respondent would note that the petitioner has failed to cite even one federal decision in support of his argument in Question I that the issue raised by the alleged introduction by the State of testimony of a prior transaction warrants the exercise of this Court's jurisdiction. Similarly, the petitioner has failed to cite even one federal authority in support of his claim in Question II that the issue raised by allegedly improper prosecutorial argument warrants review by this Court. (See Reasons for Granting Writ in Petitioner's Brief, at 16-27)

This Court has adhered to the principle that it will not review judgments of state courts which rest upon adequate and independent state (or nonfederal) grounds, and many decisions evidence this Court's intention to scrupulously observe this long standing rule. See Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Holly v. Lawrence, 317 U.S. 518 (1943); McGoldrick v. Gulf Oil Corp., 309 U.S. 2 (1940); Kalb v. Feuerstein, 308 U.S. 433 (1943). That is, a review is precluded if the decision of the state court is upon a nonfederal ground or a point of local or general law sufficient to support the judgment, or where the question is one of

state practice or remedy. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, supra; United Gas Public Service Co. v. Texas, 303 U.S. 123 (1938); Kammerer v. Kroeger, 299 U.S. 302 (1937). Before this Court will entertain jurisdiction to review a judgment of a state court, it must affirmatively appear from the record not only that a real and substantial federal question was involved, but that the decision of the state court on the federal question was necessary to its determination of the cause. Black v. Cutter Laboratories, 351 U.S. 292 (1956); Durley v. Mayo, 351 U.S. 277 (1956); Wilson v. Cook, 327 U.S. 474 (1946). Stated differently, even where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this Court is without jurisdiction to review if the non-federal ground is independent of the federal ground and is adequate to support the judgment. Jankovich v. Indiana Toll Road Com., 379 U.S. 497 (1956); Fay v. Noia, 372 U.S. 391 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278 (1962); Black v. Cutter Laboratories, supra; Durley v. Mayo, supra. The policy behind these principles was clearly stated Herb v. Pitcairn, supra, at 125-126:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted.] The reason is so obvious that it has

> rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. [Emphasis supplied.]

In Lynch v. New York, 293 U.S. 52, (1934), this Court explained:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered

could not have been given without deciding it.

With regard to the issue that the trial court erroneously allowed the "introduction" of testimony of a prior transaction, it is evident that the decision below rests on adequate and independent state grounds, and that no federal question is involved. In rejecting the petitioner's contention on this issue, the court below set forth the pertinent facts appearing in the record and then ruled:

> The cross examination of the defendant and the subsequent rebuttal by the State was proper under the rule stated in Dabney v. State, 119 Fla. 341, 161 So. 380 (1935); and Fla. R. Crim. P. 3.250. See also rule in Matera v. State, 218 So. 2d 180 (Fla. 3d DCA 1969).
>
> Oliva v. State, supra, 324 So.2d at 1068.

The court below therefore based its decision upon a Florida rule of criminal procedure and case law which delineate the proper confines of cross examination and impeachment of the accused's testimony when he chooses to take the stand in his own behalf. See Fla. R. Crim. P. 3.250; Dabney v. State, 119 Fla. 341, 161 So. 3380 (1935). Rule 3.250 states in essence that when the accused becomes a witness in his own behalf, he is subject to cross examination as any other witness (provided,

of course, that his Fifth Amendment rights are protected). See Fla. R. Crim. P. 3.250. In Dabney v. State, supra, the Florida Supreme Court specifically stated the principle that

> ...if a defendant voluntarily takes the stand and testifies as a witness in his own behalf, then he becomes subject to cross-examination as any other witness and the prosecuting officer has the right to comment on his testimony, his manner and demeanor on the stand, the reasonableness or unreasonableness of his statements, and on the discrepancies which may appear in his testimony to the same extent as would be proper with reference to testimony of any other witness.
>
> Dabney v. State, supra, 161 So. at 381.

As reflected by the opinion itself, the petitioner in the present case untruthfully first testified that he had never before the September 5th meeting seen State's witness, Debbie Young. (TR 89, 90) Further, the petitioner testified under oath that he had never given cocaine to Debbie Young, as evidenced by the following excerpt from the record:

> Q. Did you hear Debbie Young testify today?

A. Yes.

Q. What she testified to is not true?

A. That I gave her cocaine?

Q. Yes.

A. That is wrong. I never gave that woman none. (TR. 89)

Further, the petitioner had also denied ever having bought anything of value from Arthur Moore (the confidential informant who accompanied Debbie Young) before the September 5th meeting, except for a gold chain which Moore offered to sell him on a prior occasion. That testimony was as follows:

Q. What did (Arthur Moore) he tell you?

A. He said to meet him over there at noon, that he wanted to show me something you might be interested in buying. (TR. 84)

* * * *

Q. You didn't ask him what it was?

A. He said he had something of value that I might be interested in buying.

Q. Have you ever bought things from him before?

A. No, I haven't.

Q. You never have?

A. No.

Q. This was the first time he offered to sell you anything?

A. No, it wasn't the first time.

Q. What else had he ever offered to sell you?

A. He offered to sell me a gold chain about six months ago, before this. (TR. 85)

Hence, based upon Florida rules governing the scope of impeachment of the accused's testimony as a test of his credibility, the court below ruled that the State could properly question the petitioner as to the nature of the August 20th meeting to bear on the credibility of his testimony at trial and on the believability of his version of the events, the petitioner having testified that he never gave cocaine to Officer Young. Oliva v. State, supra, 346 So.2d at 1067, 1068. It is clear therefore that the decision below rests on an adequate and independent state ground and that no federal issue of any sort is involved.

Moreover (as if this were not sufficiently convincing), the court below rested its decision upon an alternative state ground. Immediately following the ruling quoted above, the court below stated:

> Even if the cross-examination of the defendant and subsequent rebuttal testimony should be held to be within the scope of the "other crimes" rule set forth in Williams v. State, 110 So.2d 654 (Fla.1959), the evidence would meet the test of the Williams rule because the evidence showed a method of operation which was the same as that employed in the sale with which defendant was charged. Cf. Crespo v. State, 344 So.2d 598 (Fla.3d DCA 1977), case no. 76-634, released April 5, 1977. (Footnote omitted)
>
> Oliva v. State, supra, 346 So.2d at 1068.

In the landmark case of Williams v. State, 110 So. 2d 654, 663, (Fla. 1959), the Florida Supreme Court announced the rule of admissibility in Florida relative to evidence tending to reveal other crimes. In that case, the court held that such evidence is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern

of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried. Williams v. State, supra, 110 So.2d at 662. Hence, it is evident that even the alternate ground for decision constitutes an independant state ground and in no fashion is an issue of a federal nature involved. This Court is thus without jurisdiction to review a state court judgment which squarely rests upon a nonfederal ground. See, e.g., Henry v. Mississippi, supra; Herb v. Pitcairn, supra; Black v. Cutter Laboratories, supra (and other cases cited).

Similarly, with regard to the issue that the trial court erroneously denied petitioner's counsel's motion for mistrial made on the basis of allegedly improper prosecutorial argument to the jury, the decision below rests on an adequate and independent state ground which is sufficient to support the judgment, and no federal issue is necessarily involved. In rejecting the petitioner's contention on this issue, the court below first recognized the impropriety of the prosecutor's comment because it was not a comment upon the evidence before the jury, but then proceeded to phrase the issue before it as follows:

> Was the remark so prejudicial as to constitute the denial of the motion for mistrial reversible error?
>
> Oliva v. State, supra, 346 So.2d at 1068.

In ruling that the remark was not of such nature so as to warrant the declaration of a mistrial, the court below expressly rested its holding upon the Florida Supreme Court decision in Johnsen v. State, 332 So.2d 69 (Fla. 1976), and upon its own decision in Wingate v. State, 232 So.2d 44 (Fla. 3d DCA 1970). Bearing in mind that the issue was phrased by the court below as whether the remark called for the remedy of declaring a mistrial, it must be noted that in both the Johnsen and Wingate cases (on which the court below relied) the Florida courts set forth in detail the general rules in Florida governing the circumstances which necessitate the declaration of a mistrial. For instance, in Johnsen v. State, supra, the Florida Supreme Court quoted from the Florida harmless error statute and announced:

> The granting of a mistrial should be only for a specified fundamental or prejudicial error which has been committed in the trial of such a nature as will vitiate the result. (Citations Omitted)
>
> When such a fundamental or prejudicial error has been committed as will necessitate the granting of a new trial later, it is within the province of the trial judge, upon proper motion, to grant a mistrial at that point. However, when an alleged error is committed which does no substantial harm and the defendant

> is not materially prejudiced by the occurrence, the court should deny the motion for a mistrial. See Daugherty v. State, 143 Fla. 578, 197 So. 501, certiorari denied, [311 U.S. 648] 61 S.Ct. 44, 85 L.Ed. 414. The granting of a mistrial effectively stops the proceedings when fundamental or prejudicial error has been committed, to save the time and expense of further procedure in the trial; but a mistrial should not be granted when the error committed is not prejudicial to the substantial rights of the defendant.
>
> * * * *
>
> The objectionable remarks made by the prosecutor sub judice were not so prejudicial that no cautionary curative instructions give by the trial judge could negate their harmful effect. (Emphasis Supplied)
>
> Johnsen v. State, supra, 332 So.2d 71, 72.

Likewise, in Wingate v. State, supra, the Florida court had reasoned:

> Finally, the appellant contends that certain remarks by the prosecutor during closing argument were so highly prejudicial that the trial judge

should have granted a mistrial upon the motion of defense counsel. We cannot agree. As was stated in the case of Spencer v. State, Fla.1961, 133 So.2d 729, "The rule is that considerable latitude is allowed in arguments on the merits of the case."

* * * *

The trial judge, too, is afforded great latitude in his discretion to grant or deny a motion for mistrial. Eg., Furr v. State, 152 Fla. 233, 9 So.2d 801 (1942). In the case sub judice, the objectional comment was weighed by the trial judge as he determined whether the jury would be so prejudiced by the argument as to render a verdict different from one properly supported by the evidence and presentation of counsel. This determination was made by the trial judge from a position of experience and intimacy with the case which cannot be duplicated by any other tribunal. Eg., Bertone v. State, Fla. App. 1969, 224 So.2d 400. Thus, although the judge found the argument objectionable and sustained counsel's objection thereto, he did not feel that this small portion of argument recited by the prosecuting attorney in her closing rebuttal statement to the jury was so inflammable and prejudicial as to require a mistrial. We are compelled to sustain the decision of the trial judge for the reasons expressed above. (Emphasis Supplied)

Wingate v. State, supra, 232 So.2d at 45, 46.

Hence, based upon the Florida rules delineating the circumstances which necessitate the declaration of a mistrial in the midst of a criminal trial, the court below ruled that the trial court had not committed error in denying such motion. As such, the decision below rests upon an adequate and independent state ground for decision which is sufficient to support the judgment, and no federal issue is necessarily involved in this ruling. In this regard, it must be remembered that this Court will not review state court decisions which rest upon a nonfederal ground or a point of local or general law sufficient to support the judgment, or where the question is one of state practice or remedy. Henry v. Mississippi, supra; Herb v. Pitcairn, supra; United Gas Public Service Co. v. Texas, supra; Kammerer v. Koreger, supra. Before this Court will entertain jurisdiction to review a state court judgment, it must affirmatively appear from the record not only that a real and substantial federal question was involved, but that the decision of the state court on the federal question was necessary to its

determination of the cause. Black v. Cutter Laboratories, supra; Durley v. Mayo, supra; Wilson v. Cook, supra. And even in cases where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this Court is without jurisdiction to review the judgment if the nonfederal ground is independent of the federal ground and is adequate to support the judgment. Jankovich v. Indiana Toll Road Com., supra; Cramp v. Board of Public Instruction, supra; Black v. Cutter Laboratories, supra; Durley v. Mayo, supra. In short, this Court will not entertain jurisdiction to review a state court decision, even though such decision is based upon both federal and state grounds, where the state ground is sufficient basis for the judgment rendered. Id.

The respondent submits that such in the case here. It is evident that the decision below does not involve a real and substantial federal question on the issue of the prosecutor's remark, and it is just as clear that no ruling on a federal question was necessary to determine the cause in this regard. Rather, the decision below may properly rest upon a state ground or rules which are completely independent of any federal ground, and which are amply sufficient basis to support the judgment rendered. Thus, no basis for jurisdiction is present.

III.

This Court has held that before it will entertain jurisdiction to review a judgment of a state court, it must affirmatively appear from the record that a real and substantial federal question, as distinquished from one devoid of merit or frivolous, was involved in the decision below. California Water Service Co. v. Redding, 304 U.S. 252 (1938); Valley S.S. Co. v. Wattawa, 244 U.S. 202 (1918); St. Louis & S.F. R. Co. v. Shepherd, 240 U.S. 240 (1917). This Court will not assume jurisdiction to review a state judgment where the asserted federal right is so wanting in foundation and so unsubstantial as to be devoid of all merit and frivolous, California Water Service Co. v. Redding, supra, Valley S.S. Co. v. Wattawa, supra, St. Louis & S.F.R. Co. v. Shepherd, supra, or where it is at most conjectural whether the party will be deprived of any constitutional right. Abrams v. Van Schaick, 293 U.S. 188 (1935). The mere averment of a federal question or some claim of constitutional right is not sufficient unless it can be shown that the question is a real one, and that there is a real and substantial controversy which deserves serious consideration. United States Fidelity & G. Co. v. Oklahoma, 250 U.S. 11 (1920); Sawyer v. Piper, 189 U.S. 154 (1902). Hence, although a question of federal law may be raised, review by this Court will not be warranted if it appears that the question is so absolutely devoid of merit as to be

frivolous, or has been explicitly foreclosed by a decision or decisions of this Court so as to leave no room for real controversy. Zucht v. King, 260 U.S. 174 (1922); Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902). This Court's limited reviewing power should therefore not be utilized to supervise adherence to its previous rulings on a factual, case-by-case basis. See Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

The petitioner in the present case has not presented a "substantial" federal question. Indeed, the issue presented by the petitioner is not only unsubstantial, but it has been foreclosed by prior decisions of this Court and leaves no room for real controversy.

Initially, the respondent takes issue with the petitioner's assertion that the credibility of State's witness Arthur Moore "was the foundation of the State's case." (See Reasons for Granting Writ in Petitioner's Brief, at 28) Indeed, State's witness Deborah Young was the police officer who purchased the narcotics from the petitioner while Arthur Moore was present. Ms. Young, the first witness for the prosecution, testified in detail as to the transaction she consummated with the petitioner. (TR. 10-36) In addition, Special Agent George D'Allessandro, who took photographs of the individuals involved during the transaction from a nearby location (TR 63), corroborated Young's and Moore's testimony to the extent to which he was able to observe the transaction from a distance.

(TR 83-68) Hence, the credibility of State's witness Arthur Moore, who was not the only witness to the transaction, cannot be so accurately described as "the foundation of the State's case."

Additionally, in Smith v. Illinois, 390 U.S. 129 (1968) and Alford v. United States, 282 U.S. 687 (1931), this Court was confronted with the same or similar claim as made by the petitioner herein. In Smith v. Illinois, supra, however, the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived although the witness admitted that the name he had first given was false. Quoting from Alford v. United States, supra, this Court expressed the following principles in holding that the petitioner had been deprived of his right of confrontation:

> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . .
>
> The question, 'Where do you live?' . . . was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.
>
> Smith v. Illinois, supra, quoting from Alford v. United States, supra, 282 U.S. at 692-694.

In addition to the fact that this Court's limited reviewing power should not be utilized to supervise the adherence to its previous rulings on a factual, case-by-case basis, it is evident that the court below adhered to the principles expressed in Smith v. Illinois, supra, and Alford v. United States, supra, and a substantial federal question that requires the exercise of this Court's jurisdiction has thus not been presented. The court below held in the present case held that the petitioner's claim of error arising from the non-disclosure during testimony of the present address of the informer witness had been disposed of adversely to him in its prior decision in Crespo v. State, 344 So.2d 598 (Fla. 3d DCA 1977). In Crespo, the court had expressly relied on Smith v. Illinois, supra, in rejecting the same contention against a similarly situated defendant. Specifically, the court stated in Crespo:

> Arthur Moore, a confidential informant, was a key witness for the prosecution. The ruling related only to his present address. Here the withholding of the present address of the witness Moore was not without some basis therefor in the interest of the witness and the State. Those factors may not have been of the kind sufficient to have justified the ruling, if disclosure of Moore's address had been essential in order for him to be properly placed in his environment. However, in this instance revelation of the then present address of the witness was not needed for that purpose. The defendant Crespo had known the witness Moore in Key West for seven or eight years. Moore and the defendant Ortega had lived and grown up together in the community of Key West, in which the trial was held. Thus, without his present address disclosed, the witness was sufficiently placed in his environment for the purpose of cross-examination, and as his environment might avail the jury in weighing his general credibility. (Emphasis added)
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> Crespo v. State, supra, 344 So.2d at 599.

Thus, Crespo, which expressly adhered to Smith v. Illinois, supra, was the basis for the Court's disposition of the present issue. Hence, even if a federal question has been presented, it is devoid of merit and has been explicitly foreclosed by a prior decision of this Court so as to leave no room for real controversy. See Smith v. Illinois, supra, Alford v. United States, supra. Review by this Court is therefore not warranted. Zuch v. King, supra; Equitable Life Assurance Society v. Brown, supra.

The record in the instant case reveals that the petitioner on cross examination was able to place the witness Arthur

Moore in his environment and elicited testimony concerning the witness' record and background. (TR. 51-55) Arthur Moore had previously appeared on behalf of the State of Florida at several trials in Key West arising out of similar drug charges (TR. 48, 49), at which trials Moore had apparently given testimony against similarly situated defendants. At the time of the present trial, Moore was still in the employ of the Florida Department of Criminal Law Enforcement, for which he had been working for a period of a year and a half prior to trial. (TR. 37, 51) Moreover, the record reveals that there was no lack of knowledge on the part of the defendant as to the background of the witness. (TR. 51-55) Thus, the effect of the disclosure of the particular fact of Moore's address during cross examination would have been minimal since the petitioner was still able to place the witness in his proper setting during cross examination. See Smith v. Illinois, supra; Alford v. United States, supra. This effect must also be viewed in light of the fact that allowing such questioning would have tended to endanger the personal safety of the witness and might also have hampered him in the continuation of his activities, thus serving State and public interest. See, for example, United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973); United States v. Crockett,506 F.2d 759 (5th Cir. 1975).

In United States v. Smaldone, supra, the federal court held that where there was no lack of knowledge on the part of

the defendant as to the background of the witness, and defense counsel made no showing as to why he needed the witness' address, the witness did not have to disclose his address. Likewise, in United States v. LaBarbera, 463 F.2d 988 (7th Cir. 1972), the federal court held that the witness' present address did not have to be revealed on cross examination because:

> The record shows that Barr's testimony was the subject of extensive cross-examination by the defendants; although this is not dispositive of the issue raised on appeal, it does suggest that any prejudice to defendants was minimal. The disability inherent in the trial court's ruling was clearly outweighed by the necessity of protecting the witness Barr.
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> United States v. Barbera, supra, 463 F.2d at 990.

Further, in United States v. Crockett, 506 F.2d 759 (5th Cir. 1975), the Fifth Circuit Court of Appeals, after citing Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), and Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), held

> the case in which a witness might be in physical danger to be an exception to the preference for disclosure.
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> United States v. Crockett, supra, 506 F.2d at 762.

In United States v. Crockett, supra, the court noted that the defendants had demonstrated no prejudice since they were able to place the witnesses in their environment. The same is true of the case at bar. The petitioner has not demonstrated prejudice. Moore was placed in his environment during testimony.

Other federal court of appeals decisions have also denied to the accused disclosure of an informant's address when the witness could be placed in his environment or a threat to his safety existed. See, e.g., United States v. Ellis, 468 F.2d 638 (9th Cir. 1972); United States v. La Barbera, 463 F.2d 988 (7th Cir. 1972). In the instant case, where the petitioner's thorough and extensive cross examination was able to place the witness in his environment, where the witness's past and present employment as an informant indicated a threat to his safety if his address was disclosed, and where the record does not disclose that any prejudice accrued to the petitioner from not being allowed to question Moore as to his present address, the trial court was well within its discretion in denying petitioner's request that he be allowed to elicit such specific testimony from Moore. Thus, even if a federal question has been presented, such question is unsubstantial and devoid of merit, and has been foreclosed by prior decisions of this Court so that no real and substantial controversy which deserves serious consideration is present herein. This Court's exercise of jurisdiction is therefore unwarranted.

See United States Fidelity & G. Co. v. Oklahoma, supra; Sawyer v. Piper, supra; Zucht v. King, supra; Equitable Life Assurance Society v. Brown, supra; Rice v. Sioux City Cemetery, supra.

Finally, the petitioner's claim that it was error for the trial court to deny him the right to cross examine witness Moore as to pending charges is totally devoid of merit and frivolous, and clearly does not present a federal question that will warrant the exercise of this Court's jurisdiction. Indeed, the petitioner's claim is patently refuted by the redord of the proceedings.

Before commencing his cross examination of Arthur Moore, defense counsel asked the court if he could go into all the pending charges against Mr. Moore. The court replied:

> I will permit you to ask him if there are any pending charges against him. I will let him answer that question and if he says he doesn't know I am not going to permit further examination. I am making the same ruling I made before. (TR.49)

During the cross examination of Moore, petitioner's counsel was indeed allowed to question the witness as to pending charges and charges that had been dropped against him, as evidenced by the following colloquy :

Q. [By Petitioner's Counsel] Are there any charges pending against you now?

A. Not to my knowledge.

Q. Were any charges dropped against you in return for your work for the Florida Department of Criminal Law Enforcement?

A. There was but it was not for no work. Not for what I was doing on this behalf.

Q. Why were they dropped then? What was the reason, if you know?

A. I don't know. You would have to see them.

Q. Who is them?

A. Well, Chappell on the 3rd Floor and Les Garringer and Rand Winter.

Q. Would you identify who Chappell is?

A. Judge Bill Chappell.

Q. Would you identify Les Garrenger?

A. Assistant State Attorney.

Q. They are the ones that dropped the charges against you?

A. They nolle prossed them.

Q. That means they were dismissed or dropped?

A. Yeah.

Q. You say not to your knowledge was it in return for any work but out of the clear blue they dropped the charges.

A. Yeah.

[Defense Counsel]: You honor, in light of the Court's earlier ruling, I will not pursue this line of questioning then. (TR 55, 56)

Since petitioner's counsel had fully explored the witness's knowledge as to why the charges were dropped, his pursuit of that line of questioning could not have unearthed any additional information relative to the witness' motive for testifying. See Rhymes v. State, 261 So.2d 527 (Fla. 3d DCA 1972); Dennis v. State, 214 So.2d 661 (Fla. 3d DCA 1968). The record thus conclusively refutes the petitioner's claim of error in this regard.

It cannot be too strongly emphasized that although the petitioner in his brief refers to Arthur Moore as the "principal" State's witness, such is not entirely accurate. The State's first witness was Officer Deborah Young (TR. 10-36), who was the officer to whom the petitioner sold

the drugs and who was present, along with Arthur Moore, during the transaction. Thus, Arthur Moore's testimony was essentially cumulative to that of Officer Young, who was also an eyewitness to the transaction.

CONCLUSION

The decision below does not involve a real and substantial federal question, but rests on adequate and independent state grounds (Questions I and II). Even if a federal question has been presented (Question III), it is unsubstantial and devoid of merit and has been explicitly foreclosed by prior decisions of this Court so as to leave no room for real and legitimate controversy. No basis for the exercise of this Court's limited reviewing power is therefore present, and the petition for writ of certiorari should be denied. See, for example, Henry v. Mississippi, supra; Herb v. Pitcairn, supra; Black v. Cutter Laboratories, supra; Durley v. Mayo, supra; Zucht v. King, supra; Equitable Life Assurance Society v. Brown, supra; Rice v. Sioux City Cemetery, supra; California Water Service Co. v. Redding, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT IN OPPOSITION was furnished by mail to the HONORABLE ALVIN E. ENTIN, 2020 N.E. 163rd St., Suite 300, N. Miami Bch., Florida 33162 and the HONORABLE MANUEL W. JAMES, La Concha Building, Key West, Florida 33040, Attorneys for Petitioner, on this ___ day of November, 1977.

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